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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2005

No. 05-____

JON E. OZMINT, Director, South Carolina Department of Corrections,

Petitioner,

vs.

ROBERT LEE NANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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QUESTIONS PRESENTED

Capital Case

I. **Whether this Court should grant certiorari because, on remand, the state supreme court ignored this Court's Order vacating its previous judgment for further consideration in light of *Florida v. Nixon* when it republished virtually all of its vacated decision and, once again, found that Respondent had received ineffective assistance of counsel based upon a presumption of prejudice analysis that is grossly inconsistent with this Court's decisions in *Cronic*, *Nixon* and *Bell v. Cone*?**

II. **Whether this Court should grant certiorari because Respondent did not demonstrate Sixth Amendment prejudice under *Strickland v. Washington*?**

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2003

No. 04-____

JON E. OZMINT, Director, South Carolina Department of Corrections,

Petitioner,

vs.

ROBERT LEE NANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Petitioner hereby makes a Petition for a Writ of Certiorari to the South Carolina Supreme Court because, following the South Carolina Supreme Court's reversal of Respondent's convictions and sentence of death on January 30, 2006. *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (*Nance II*). After this Court's January 10, 2005 Order vacating the state supreme court's previous judgment granting Post-Conviction Relief and remanding "for further consideration in light of *Florida v. Nixon*, 534 U.S. [175], --- S.Ct. ---- (2004)." *Ozmint v. Nance*, 543 U.S. 1043 (2005), the South Carolina Supreme Court disregarded this Court's Order vacating its earlier judgment; re-published and re-applied its prior decision; and granted relief through application

of the presumption of prejudice analysis in *United States v. Cronic*, 466 U.S. 648 (1984). See *Nance II*, 626 S.E.2d at 879-84. Petitioner asks that a Writ of Certiorari issue to review the judgment of the South Carolina Supreme Court because this analysis is contrary to *Cronic*, *Nixon* and *Bell v. Cone.*

CITATION TO THE OPINIONS BELOW

The January 30, 2006 decision of the South Carolina Supreme Court granting PCR is published as *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006) (*Nance II*) and is attached to the Petition as **Appendix I**. The unpublished March 8, 2006 Order of the South Carolina Supreme Court denying the State's timely petition for rehearing is attached to the Petition as **Appendix II**. This Court's Order granting certiorari, vacating the state supreme court's judgment and remanding the case for further consideration is found at *Ozmint v. Nance*, 543 U.S. 1043 (2005) and is attached to the Petition as **Appendix III**. The April 24, 2004 decision of the South Carolina Supreme Court granting relief is published as *Nance v Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004) (*Nance I*) and is attached to the Petition as **Appendix IV**. The Order of the South Carolina Supreme Court denying Petitioner's Petition for Rehearing in *Nance I* is attached to the Petition as **Appendix V**.

JURISDICTION

The Order of the Supreme Court of South Carolina granting PCR was entered on January 30, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1.This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury. . . ."

2. This case also involves the Fourteenth Amendment to the United States Constitution which provides in pertinent part that "no[ ] . . . State [may] deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. Procedural History.

The Florence County Grand Jury indicted Respondent at the April 1993 term of court for murder, criminal sexual conduct (CSC) in the first degree, assault and battery with intent to kill (ABIK), burglary in the first degree, and armed robbery. Ernest D. Hinnant, Esquire, and Henry M. Anderson, Jr., Esquire, represented him. Nance received a jury trial on June 21-25, 1993. The jury convicted him of all charges. He was sentenced to death on the murder charge. He received a life sentence for burglary, thirty years for first degree CSC, twenty years for ABIK and twenty-five years for armed robbery.

The South Carolina Supreme Court affirmed his convictions and sentences on direct appeal, on January 8, 1996. *State v. Nance*, 466 S.E.2d 349 (S.C. 1996). That Court denied a timely Petition for Rehearing on February 13, 1996. On May 10, 1996, Respondent filed a Petition for Writ of Certiorari to the Supreme Court of South Carolina in the United States Supreme Court. This Court denied certiorari on June 24, 1996. *Nance v. South Carolina*, 518 U.S. 1026 (1996).

On September 16, 1996, Nance filed a verified PCR Application, which he subsequently amended. An evidentiary hearing was held on July 13-16, 1998. The PCR court denied relief on July 16, 1999, **App. 4670-5016**, relying upon *Strickland v. Washington*, 466 U.S. 668 (1984) and specifically rejecting a *Cronic* analysis. **App. 4988-5016**. The PCR court subsequently

denied Respondent's motion to alter or amend the judgment. **App. 5208.**

On September 6, 2000, Respondent filed a Petition for Writ of Certiorari in the South Carolina Supreme Court, asserting that he was entitled to relief under both *Strickland* and *Cronic* on his ineffective assistance claims. Petitioner thereafter made a Return on January 12, 2001, arguing that *Cronic* did not apply. The South Carolina Supreme Court granted certiorari to review all issues on February 22, 2002.

Following briefing by the parties, the South Carolina Supreme Court filed its April 24, 2004 decision misapplying this Court's decision in *Cronic* and finding that Nance had received ineffective assistance of counsel. *Nance v. Frederick*, 596 S.E.2d 62, 64-67 (S.C. 2004) (*Nance I*). The State's timely Petition for Rehearing was denied on May 24, 2004. On January 10, 2005, this Court granted the State's Petition for Writ of Certiorari, vacated the South Carolina Supreme Court's judgment and remanded for further consideration in light of *Florida v. Nixon*, 534 U.S.[175] (2004)." *Ozmint v. Nance*, 543 U.S. 1043 (2005).

After briefing and oral arguments by the parties,[1] the South Carolina Supreme Court filed a published Opinion on January 30, 2006, in which it re-published almost all of its previously vacated decision and, once again, granted relief by applying *Cronic*'s presumption of prejudice to Petitioner's case. *Nance v. Ozmint*, 626 S.E.2d 878 (S.C 2006) (*Nance II*). The State's February 14, 2006 Petition for Rehearing was denied in a March 8, 2006 Order.

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[1]Nance expressly conceding before the original state court decision and on remand that he did not rely on *Cronic*, **See Reply Brief of Petitioner, p.7; Brief of Petitioner on Remand from the United States Supreme Court, p. 2.**

B. Statement of Facts.

The state supreme court described the facts as follows:

> The victims, Robert and Violet Fraley, were attacked at home where they lived alone. [FN2] On the night of the intrusion, Mr. Fraley testified that he and his wife went to bed around 9:30 or 10:00 p.m. Mr. Fraley awoke to the sound of someone knocking on the front door of the house. Mr. Fraley testified that he saw a man standing on the porch, and that the man asked him if he could come in to use the phone because his truck had broken down. Mr. Fraley told him he could use the phone outside in his shop. When the man said he did not have a light to see his way to the shed, Mr. Fraley left the door to get him a flashlight. Mr. Fraley testified that when he unlatched the door to hand over the light, the man forced the door open and immediately began stabbing him with a screwdriver.
>
> [FN2. Mr. and Mrs. Fraley were 78 and 73 years old respectively at the time of the attack.]
>
> At some point, Mrs. Fraley entered the room and tried to help Mr. Fraley as he tried unsuccessfully to get away from the intruder. Mr. Fraley was bleeding profusely and his wife was trying to wipe up blood while the intruder was demanding money and the keys to their car. Mrs. Fraley retrieved both of their wallets and their keys and gave approximately $194 in cash and the keys to the intruder. Mr. Fraley testified that he pleaded with the intruder not to kill him and his wife, but that the intruder replied that he was going to kill

> both of them. The intruder then raped and killed Mrs. Fraley. Miraculously, Mr. Fraley survived the attack but was hospitalized for thirteen days.
>
> [Respondent] was arrested in the early morning hours following the attack after he was pulled over driving the Fraleys' Cadillac. There was blood on his clothes that was later determined to be Mrs. Fraley's. The car also contained a bank envelope that was taken from the Fraleys' home during the attack. Two people were in the car with Petitioner when he was stopped. One person fled the scene and was never apprehended. The other person, Erskine Green, testified at Petitioner's trial that he did not know Petitioner and that Petitioner had picked him and the other man up on the side of the road.

Nance II, 626 S.E.2d at 879.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. This Court should grant certiorari because, on remand, the state supreme court ignored this Court's Order vacating its previous judgment for further consideration in light of *Florida v. Nixon* when it republished virtually all of its vacated decision and, once again, found that Respondent had received ineffective assistance of counsel based upon a presumption of prejudice analysis that is grossly inconsistent with this Court's decisions in *Cronic*, *Nixon* and *Bell v. Cone*.

This Court should grant certiorari because on remand, the state supreme court ignored this Court's directive, *see Ozmint v. Nance*, 543 U.S. 1043 (2005), to reconsider the case in light of

Nixon. Instead of meaningfully analyzing Nance's ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984)'s two-pronged test, the state supreme court republished virtually all of its vacated decision and, once again, found that Respondent had received ineffective assistance of counsel based upon a presumption of prejudice analysis that is grossly inconsistent with this Court's Order remanding the case and its decisions in *Cronic*, *Nixon* and *Bell v. Cone*, 535 U.S. 685, 696-97 (2002). *Nance II*, 626 S.E.2d at 879-84.

In reversing the PCR judge's Order denying post-conviction relief to Respondent, the state supreme court began its legal analysis by properly stating that a defendant claiming that he received ineffective assistance of counsel must generally show both deficient performance and resulting prejudice. *Nance II*, 626 S.E.2d at 880. However, the court then immediately reverted to the three situations where this Court has indicated that a presumption of prejudice analysis under *Cronic* is proper before its terse and factually inaccurate discussion of *Nixon*. *See Nance II*, 626 S.E.2d at 880.

Next, the state supreme court made a perfunctory reference to *Nixon*, stating that *Nixon* "reaffirmed the notion that per-se prejudice occurs infrequently.... [and] that *Cronic*'s presumed prejudice standard was only used for those cases where counsel fails to 'function in any meaningful sense as the Government's adversary.'" *Nance II*, 626 S.E.2d at 880-81.[2]

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[2]The state supreme court's consideration of *Nixon* was so limited that it mistakenly found that *Nixon* had "held that entering a guilty plea on behalf of a defendant without his express consent did not constitute ineffective assistance of counsel" and this Court "opined that the decision to plead guilty was a strategy employed by trial counsel in an effort to present mitigating evidence at sentencing in an attempt to save the defendant's life." *Nance II* at 880. However, Nixon received a jury trial and this Court in *Nixon* noted that "counsel lacks authority to consent to a guilty plea on a client's behalf," 543 U.S. at 187, but it rejected the Florida Supreme Court's conclusion that trial

Despite the remand Order, the state supreme court analyzed counsel's performance utilizing a "quasi-*Strickland*" analysis, but still presuming prejudice - before concluding that "this type of "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.' " *Nance [I]*, ... 596 S.E.2d at 67. (citation omitted). *Nance II*, at 883.[3] The court held that "counsel was ineffective under *Cronic* and failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client." *Id* at 883.

The state supreme court's opinion described the present case as a "classic *Cronic* ineffectiveness case ... because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of [Nance's] trial." *Nance II*, at 882. This reflects the state supreme court's misunderstanding of the Sixth Amendment and the precedent of the this Court. *Nixon* reaffirms this Court's earlier holding that *Cronic*'s presumption of prejudice does not apply unless counsel completely fails to oppose the State's case. Because there was no complete failure in this case, the state supreme court erroneously applied such a presumption.

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counsel's strategy in that case was "the functional equivalent of a guilty plea." *Id* at 188. The state supreme court refused to correct this error when it was brought to the court's attention in the State's **February 14, 2006 Petition for Rehearing, p. 4 n.1.**

[3]The state court's reliance upon *Frett v. State*, 298 S.C. 54, 56, 378 S.E.2d 249, 251 (1988) is **not** a state law basis for applying a presumption of prejudice to Nance's claims. Rather, *Frett* is yet another example of the state supreme court's erroneous analysis of ineffective assistance claims under the Sixth Amendment. *Frett* cites *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984), which in turn, relied upon *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982). *House* was overruled by this Court's seminal decision in *Strickland*.

In *Cronic*, the Court determined that the Court of Appeals erroneously reversed the defendant's conviction under the Sixth Amendment without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial. 466 U.S. at 650. The Court remanded to allow the claim to be considered under *Strickland*'s test. 466 U.S. at 666-67& n. 41. This Court identified three situations implicating the right to counsel that involved circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id* at 658-59. First, the "[m]ost obvious" situation was the "complete denial of counsel." *Id* at 659. The Court determined that a trial would be presumptively unfair where the accused is denied the presence of counsel at "a critical stage." *Id* at 659, 662.[4] Second, a similar presumption is warranted if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic, supra*, at 659. Finally, the Court held that in cases like *Powell v. Alabama*, 287 U.S. 45 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected. *Cronic*, 466 U.S. at 659-62.

In *Cone*, this Court reversed the Sixth Circuit Court of

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[4]As the Court explained in *Cone*, the Court used this phrase in *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961), and *White v. Maryland*,373 U.S. 59, 60 (1963) (per curiam), "to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." *Cone*, 535 U.S. at 695-96.). The Court has also assumed prejudice in rare instances where counsel is physically present but substantially disabled from performing essential functions. *E.g.*,*Geders v. United States*, 425 U.S. 80, 88 (1976) (counsel prohibited from consulting with defendant during a 17-hour overnight recess); *but cf. Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980) (declining to extend *Holloway* and holding that, absent objection, a defendant must demonstrate that an alleged conflict of interest affected the adequacy of his attorney's representation).

Appeals, which had concluded that a capital defendant's trial counsel did not subject the State's call for the death penalty to meaningful adversarial testing and, thus, *Cronic*'s presumption of prejudice analysis applied because counsel did not ask for mercy after the prosecutor's final argument. 535 U.S. at 693. Again, this Court stressed that *Cronic*'s exception to the general *Strickland* requirement that a defendant must show prejudice based on counsel's failure "to subject the prosecution's case to meaningful adversarial testing" is very narrow. Specifically, the Court stated that when it "spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that *the attorney's failure must be complete.* We said 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' *Cronic, supra*, at 659. (emphasis added). In *Cone* as in the present case, "respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." 535 U.S. at 696-97. Finally, this Court in *Cone* held that "[t]he aspects of counsel's performance challenged by respondent--the failure to adduce mitigating evidence and the waiver of closing argument--are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components." *Id.* at 698.

In *Nixon*, 543 U.S. 175 (2004), this Court reversed the Florida Supreme Court and held that counsel's concession of guilt in a capital murder trial, made after consultation with the client but without his express approval, did not constitute deficient performance where counsel's strategy was reasonable under *Strickland*. The Court found that the equation of trial counsel's strategy to a guilty plea had led the Florida Supreme Court to erroneously presume deficient performance and, then, misapply the presumption of prejudice that *Cronic* had clearly reserved for

situations in which counsel has entirely failed to function as the client's advocate. The Court emphasized that *Cronic* is a *very narrow* exception to *Strickland*'s prejudice requirement. The Court found that counsel's strategy in *Nixon* did not "rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary." *Id* at 189-92 (footnote omitted). *See also Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (clarifying that *Cronic* is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable, citing *Cronic*, 466 U.S. at 659 & n. 26); *Williams v. Taylor*, 529 U.S. 362, 391, 396-97 (2000) (examining a claim under the *Strickland* standard where the petitioner's "trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury").

As in *Nixon* and *Cone*, Mr. Nance challenged aspects of counsel's performance "of the same ilk" as other specific attorney errors this Court has held are "subject to *Strickland*'s performance and prejudice components." *See Cone*, 535 U.S. at 698; *cf. Nixon*, 543 U.S. at 189-92. He complained of counsel's performance in opening statement; the failure to adequately present a case in the guilt phase; counsel's failure to qualify a defense psychiatrist as an expert; counsel's failure to adequately prepare a guilt phase defense witness(es); counsel's presentation of the case in mitigation and counsel's penalty phase closing argument. He did not raise claims that demonstrated his counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic, supra*, at 659. He simply raised a myriad of claims that are appropriate for a *Strickland* analysis, as opposed to the more focused and orderly presentations in *Cone* and *Nixon*.

Other lower federal and state courts have correctly recognized that the *Cronic* doctrine is only to be applied in "very rare", "extraordinary", and "exceptional" circumstances, upon an "extremely high showing" of deficient performance. *E.g. Young v. Catoe*, 205 F.3d 750, 762-63 (4th Cir. 2000) (applied only in "rare cases" and "extraordinary" situations); *Toomey v. Bunnell*,

898 F.2d 741, 744 n. 2 (9th Cir. 1990) (applied "very sparingly").

Given such a strict standard, other lower federal courts have construed the *Cronic* presumption as inapplicable where an otherwise incompetent counsel at least provided *some* representation to the client. *See, e.g. Young, supra* (counsel must "entirely" fail to subject the case to meaningful adversarial testing); *Childress v. Johnson*, 103 F.3d 1221, 1228 (5th Cir. 1997) (for *Cronic* to apply, counsel must not be merely incompetent, but inert); *Scarpa v. DuBois*, 38 F.3d 1 (1st Cir. 1994) (analogizing the *Cronic* exception to harmless error doctrine, in that a lawyer's "maladroit performance " is a trial error, where a "non-performance" is a structural error). *Cronic* is only applicable where there is an entire abdication of the responsibility to represent the client. *Cone, supra.*

For example, in *Cronic* itself, this Court did not presume prejudice even though the attorney was young, had little criminal experience, and was given only 25 days to prepare a complex case with some inaccessible witnesses. 466 U.S. at 663-65.[5] Even at

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[5]In *Young*, the Fourth Circuit Court of Appeals refused to presume prejudice based on counsel's other representation even though counsel conceded guilt as a strategic matter and made two misstatements of law in the guilt phase argument. In *Craker v. McCotter*, 805 F.2d 538, 542 (5th Cir. 1986), the Fifth Circuit Court of Appeals rejected a *Cronic* analysis because the defendant had received at least some meaningful representation from a civil attorney appointed fifteen minutes before the guilty plea hearing, where the attorney knew the plea had been worked out beforehand, and the attorney satisfied himself that the defendant wanted the plea and understood the ramifications. In *Gochicoa v. Johnson*, 238 F.3d 278 (5th Cir. filed Dec. 29, 2000), the Court refused to presume prejudice despite counsel's many alleged failings, because counsel at least provided *some* representation, by meeting with the defendant, making a general discovery motion, going to the crime scene, interviewing witnesses, cross-examining the state's witnesses, calling the defendant to the stand, and calling two sentencing phase witnesses. *See also Childress, supra* (discussing cases requiring proof of prejudice even though counsel's trial preparation was "somewhat casual", or counsel failed to

worst Nance's trial counsel offered at least some defense for him at trial. Trial, and their performance simply cannot be considered so egregious as to have completely precluded an adversarial proceeding. Counsel conducted *voir dire* **(App. 9-316)**; participated in a *Batson v, Kentucky*, 476 U.S. 79 (1986) hearing **(App. 327-35)**; gave an opening statement **(App. 344-46)**; objected to introduction of Ms. Fraley's bloody clothing **(App. 385-89)**; cross-examined a number of witnesses (especially the state's mental health witnesses about bias and the validity of their conclusions) **(App. 409-10; 433-34; 446-47; 455; 462-63; 467-69; 474-76; 512-13; 524-35; 639-45;650-52; 656-57; 740; 756-58)**; presented a mental health defense case, including a mental health expert and a family member **(App. 573-612; 619-32. See also App. 763-64** [penalty phase defense witness]); objected to introduction of crime scene photographs, as well as Nance's prior record and other bad acts in the penalty phase **(App. 719-29)**; incorporated that defense case into sentencing **(App. 764)**, and gave closing arguments in both phases. **App. 681-87; 776-78B.** Nance's counsel certainly offered the jury at least some support for alternatives to guilt and death. Even construing the record most favorably to Respondent, counsel's conduct unquestionably was above the level of egregious error which fails to achieve any sort of meaningful adversarial testing of the prosecution's case whatsoever. As such, a presumption of prejudice is not proper. *See Nixon; Cone.*

Much like the dissent in *Cone*, 535 U.S. at 715-16 (Stevens, J., dissenting) and as it had in its earlier decision, the state supreme court concluded that *Cronic* applied to Nance's ineffective assistance claims based, in large part, upon his speculative showing in the state PCR court that lead counsel Hinnant had problems with his physical health, purported

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challenge on racial bias, or counsel failed to object to a variation between the indictment and charge).

alcoholism and prescription drug usage. *Nance II*, 626 S.E.2d at 881. However, the reliance upon this speculative showing ignores that the PCR judge rejected Petitioner's evidence that Mr. Hinnant was impaired by mental or physical infirmities (**App. 4988-5001**) and misapprehended that there was evidence to support his findings. *Cf. Bell*, 535 U.S. at 697 n. 4.[6]

Dr. David Bachman, a neurologist who treated Hinnant two years after Nance's trial (in July 1995), was the only one of Nance's experts who had ever met Hinnant much less examined him. He opined that Mr. Hinnant had a memory and concentration impairment which he thought very likely existed before Bachman's examination, the most likely diagnosis of which was alcohol dementia, followed by an alternative diagnosis of early Alzheimer's disease and which he believed had developed in a "gradual indolent fashion." **App. 2137-43**. Bachman admitted that the blood test results which he felt indicated drinking could have been caused by other less insidious factors, such as other medications; and he admitted that it was difficult to say with certainty how long the dementia process had existed, but that he guessed it began two to three years prior to his examination of Mr. Hinnant. **App. 2150-51; 2159-60; 2165**. Even if Bachman was correct and an extremely gradual process was just beginning two or three years prior to July 1995, at worst, Hinnant would have *just begun* to have experienced the slight beginnings of the process at the time of Nance's trial. The testimony of co-counsel Anderson was that he did not notice any problems. This inference also conforms with the perceptions of Solicitor Saleeby, who testified that he did not notice a "slowing down" process in Hinnant until well after this trial.

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[6]The state court also focused upon the inexperience of co-counsel. Again, this is inconsistent with *Cronic*, where this Court did not presume prejudice even though the attorney was young, had little criminal experience, and was given only 25 days to prepare a complex case with some inaccessible witnesses.

Equally speculative testimony was presented from three other experts, who never met Hinnant and predicated their findings sole on test results: Drs. James Evans (a psychologist), Alexander Morton (a pharmacologist) and Robert Malcom. **See App. 2040-74; 2250–2314-23;2347-49; 3297-3391**. Each had to admit other possible causes for their findings inconsistent with alcohol or drug use and their testimony was rejected by the PCR court because it was inconsistent with the observations of Hinnant's family (**App. 2659-65**), trial counsel (**App. 1915**), the defense investigator (**App. 1815-16, 1834**) and the Solicitor, whom the PCR court found was very credible. **App. 2631-37; 2639-42; 2655-56**. Finally, Mr. Hinnant himself testified. He stated his recurring ulcers precluded him from drinking, he denied having any memory problems at the time of Respondent's trial, and he remembered the general nature of the case, as well as the race and sex on the victim. **App. 2666-69**. Mr. Hinnant also generally remembered aspects of how he would conduct a defense in a capital case. **App. 2670-84**. The PCR Court found that Hinnant's testimony did not indicate one who is on the tail end of a "precipitous drop" into dementia, contrary to the expert testimony presented by Respondent. **App. 4999**. Thus, as the above discussion shows, Respondent did not meet the burden of proving that Hinnant suffered from any physical or mental deficiency which affected the trial, *cf. Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (habeas petitioner failed to prove counsel was intoxicated at trial where investigator testified he did not observe any indications of intoxication), and the state supreme court erred by relying upon this speculative evidence of counsel Hinnant's supposed impairments as a reason for applying *Cronic* to this case. *Bell*, 535 U.S. at 697 n. 4. Courts from other jurisdictions consistently have not found *per se* prejudice where trial counsel was allegedly suffering from health or substance abuse problems where there is no actual prejudice. *E.g., Bellamy v. Cogdell*, 974 F.2d 302 (2nd Cir. 1992); *McDougall v. Dixon*, 921 F.2d 518, 535 (4th Cir. 1990); *Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987); *People v. Garrison*, 765 P.2d 419 (Cal. 1989) (en

banc).

Further, the record reflects that Hinnant personally participated in *voir dire*, called witnesses, made objections and motions, and interviewed witnesses. ***See, e.g.*** **App. 306-07; 383; 433; 455; 571-633; 763-64; 795; 919-58; 1859**. He also sent an investigator to talk to witnesses, interviewed mental health doctors, obtained the psychiatric evaluation, met with the defendant, spoke with family members, and consulted with a mental health professional. **App. 1795; 1803; 1856; 1815; 1849; 1859; 3225, 3477-78; 2433**. Such involvement is sufficient to preclude a presumption of prejudice under *Cronic* and *Bell*, *supra*. The bottom line is that, even at worst, trial counsel did assume responsibility for the case and proceeded with at least a facially valid defense and case in mitigation. Many of Nance's claims for relief have nothing to do with one another, and thus could not be cumulative in nature. For example, the alleged failure to voir dire on ability to consider mental health defenses has absolutely nothing to do with, and could have absolutely no effect on, the alleged failure to challenge an in-court identification. That is why a particularized prejudice inquiry is the appropriate norm in all but cases where counsel provided absolutely no effective services at all. *Accord Cone*, 535 U.S. at 696-97.

Moreover, the state supreme court's application of *Cronic*'s presumption of prejudice to the present case is inconsistent with the decisions of other state and lower federal court's applying this Court's opinion in *Bell*, *see, e.g.*, *People v. Snow*, 65 P.3d 749, 793-94 (Cal. 2003); and this Court has summarily vacated and remanded a number of decisions employing a presumption of prejudice analysis such as that relied

upon by the state supreme court in this case.[7]

Finally, Petitioner would note that the state supreme court's *Cronic* analysis is inconsistent even with the final position of Respondent's counsel below. Respondent expressly abandoned his so-called *Cronic* claim that he was entitled to relief based upon the presumption of prejudice in *Cronic* in the **Reply Brief of Petitioner (at p.7)** and the **Brief of Petitioner on Remand from the United States Supreme Court, at p. 2.**

II. This Court should grant certiorari because Respondent did not demonstrate Sixth Amendment prejudice under *Strickland v. Washington* on any of his ineffective assistance of counsel claims.

In *Strickland*, which was decided on the same day as *Cronic*, this Court held that even if a defendant can establish that

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[7] Although the Court did deny certiorari to review the decision of the Sixth Circuit Court of Appeals in *Quientero v. Bell*, 368 F.3d 892 (6th Cir., May 24, 2004), *cert. denied*, *Bell v. Quientero*, 125 S.Ct. 2240 (2005) after the lower court adhered to its original decision after remand, two members of this Court would have granted certiorari because the "Court of Appeals committed the same error we corrected in *Cone*, *id* at 2241 (Thomas, J., dissenting); and that case involved alleged structural error, which is not present in this case. Also, the Sixth Circuit Court of Appeals' decision in *Quientero* has been rejected by the Fifth Circuit, *see Virgil v. Dretke*, 446 F.3d 598, 607 & n.36 (5th Cir. 2006), and lower courts, other than South Carolina, have addressed virtually all ineffectiveness claims under *Strickland* rather than *Cronic*. *E.g.*, *Walker v. State*, 391 Md. 233, 892 A.2d 547, 557-58 (Md. Ct. App. 2006); *Davis v. VanNatta*, 438 F.3d 707, 711 (7th Cir. 2006)(quoting *Nixon*, 543 U.S. at 190; and rejecting the petitioner's claim that "prejudice should be presumed because he proceeded to trial with allegedly unprepared counsel and because no attorney represented him during plea negotiations"); *Holland v. State*, 916 So.2d 750, 755-56 & n.4 (Fla. 2005) (rejecting petitioner's argument that his ineffective assistance of counsel - based on his trial counsel's concession of guilt to attempted first-degree murder without Holland's express, prior consent - must be reviewed under *Cronic*), *cert. denied*, 126 S.Ct. 1790 (2006); *Smith v. Commissioner of Correction*, 871 A.2d 1103, 1105-06 (Conn. App. 2005), certification denied, 882 A.2d 676 (Conn. 2005).

counsel's "representation fell below an objective standard of reasonableness," 466 U.S. at 688, he is not entitled to relief unless he can also prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This Court should grant certiorari because Nance did not show prejudice on any of the ineffective assistance of counsel claims that he asserted. *See also Wiggins v. Smith*, 539 U.S.510 (2003); *Cone*, 535 U.S. at 695.

Because the state supreme court applied a presumption of prejudice under *Cronic*, it dispensed with the second prong of this Court's *Strickland* analysis. In analyzing the various claims related to counsel's performance in the guilt phase of the trial, the state supreme court thus ignored that Nance failed to show actual prejudice on any allegation. An extraordinary amount of evidence proved that Nance committed the murder and the statutory aggravating circumstances. Aside from Mr. Fraley's painstakingly graphic and detailed eyewitness account (**App. 346-70**), there was DNA evidence (**App. 552-71**), evidence that Respondent was apprehended driving the victims' car (**App. 401-10**), and Respondent's own statements, both prior to the murder and to law enforcement following his arrest. **App. 434-46; 456-67; 469-75.** In light of this evidence, there could not be a reasonable probability of a different result but for counsel's errors, as required for relief under *Strickland, supra.*

While the absence of Sixth Amendment prejudice is especially true with respect to the allegations of counsel's representation in the guilt phase, it is also true as to the penalty phase, where a capital defendant demonstrates prejudice by establishing that "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently weighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; See also *Wiggins, supra*. Respondent cannot meet this burden in

light of the overwhelming proof of the alleged statutory aggravating circumstances. *Id.*

Both the supposed health problems of lead counsel and the inexperience of co-counsel are discussed in **Argument I**. The record demonstrates that neither factor resulted in actual prejudice to Nance. Of the myriad of other allegations raised by Nance, the state supreme court first addressed trial counsel's opening statement, in which he introduced himself and co-counsel to the jury by saying, "I did not ask [to represent Respondent], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either. He was just appointed to represent Mr. Nance." *Nance II*, 626 S.E.2d at 881. There is absolutely no prejudice to Nance. Taken in context, it cannot be seriously said that the jury would have understood counsel's argument to be anything other than a plea for mercy and sparing his life because "Mr. Nance [was] a sick man." *See Thompson v. Cain*, 161 F.3d 802 (5th Cir. 1998) (no attorney error in certain aspects of closing argument, including reference to being appointed counsel, where attorney otherwise pled for life, referred to mitigating evidence, and reminded the jurors of their ultimate decision). The absence of prejudice is underscored by the incredibly overwhelming evidence of guilt that was presented by the State, as previously discussed. In light of this evidence, there could not be a reasonable probability of a different result but for counsel's errors, as required for relief under *Strickland, supra*. Most of Nance's complaints about trial counsel's performance in the guilt phase may also be resolved on this basis as well.

The state supreme court also focused upon evidence that the first defense witness, a Florence County detention center officer, testified that Nance threw urine at a female corrections officer while in prison; but admitted on cross-examination that this was the only incident of misbehavior during his seven-month confinement under his watch. *Nance II*, 626 S.E.2d at 881. **App. 573-76.** Again, there was no prejudice from counsel's omission.

First, there was the overwhelming evidence of guilt and identity was conclusively established. Second, the purpose of a limiting instruction would have been to preclude the jury from considering evidence of these bad acts as establishing Nance's propensity to commit crimes and thereby considering it as evidence of his guilt for the crime charged. However, counsel eliminated the necessity of the jury having to determine whether or not he committed the crime by expressly conceding that he committed the offense. **App. 681-88.**[8] There is no prejudice in the penalty phase because the trial judge did give a limiting charge concerning the jury's consideration of evidence of Nance's bad character on two separate occasions even though he was not entitled to one as a matter of state law. *State v. Skipper*, 328 S.E.2d 58, 62 (S.C. 1985), *rev'd. on other grnds.*, 476 U.S. 1 (1986). **App. 752-53;778.**

With respect to trial counsel's alleged failure to adequately prepare and present evidence in support of the insanity and GBMI offenses through the defense's forensic psychiatrist, Dr. John Dewitt, *Nance II*, 626 S.E.2d at 881, Nance was not prejudiced by counsel's performance because at trial, and at the PCR hearing, Dewitt adhered to his diagnosis that Nance was schizophrenic at trial: that Nance was unable to conform his conduct to the requirements of the law at the time of the murder; and that he was unable to determine whether Nance was NGRI. **App. 590-612; 2515-30**[9].

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[8]Also, a guilt phase limiting instruction would have precluded the jury from considering other bad acts evidence to impeach Dr. Sheth's testimony, which was counsel's purpose for eliciting the evidence. **App. 4890-93 & n. 110.** Trial counsel Anderson testified that counsel made a strategic decision not to contest identity and, instead, to focus on the defenses of insanity and GBMI. **App. 1903-04; 1973-76.**

[9]Petitioner submits that trial counsel went with the best they had, which was an expert who conclusively opined GBMI but also expressed a strong opinion that Petitioner was insane at the time of the offenses. *E.g.*

Nance also claimed trial counsel should have discovered further evidence of his intoxication from drugs and/or alcohol at the time of the offense. None of the police reports produced by the State contained any indication, whatsoever, that Nance was intoxicated. Moreover, the trial witnesses who dealt with Nance on November 6-7, 1992, as well as those who also testified at the PCR hearing did not give testimony showing . This is true even of Plessey Cantey's recantation testimony.[10] As to the second question, it is clear that no evidence of a prior hospitalization for psychosis exists. Further, the conclusions by the State's examiners were contrary to Dr. Dewitt's findings; and, the PCR judge properly found that the credibility of Dewitt's trial testimony would have been even further weakened if he had arrived at his diagnosis *after* the court-ordered evaluation by two neutral examiners revealed that Petitioner was competent, that he was not mentally ill and that he was neither NGR. or GBMI. Therefore, Petitioner was not prejudiced by counsel's supposedly deficient performance. *Truesdale v. Moore*, 142 F.3d 749, 754-55 (4th Cir. 1998).

Likewise, Nance did not prove that trial counsel's preparation and presentation of other evidence in support of the insanity and GBMI defenses was prejudicial. In support of this allegation, he asserted that there was insufficient evidence presented of his intoxication at the time of the offenses. Even assuming that counsel's performance was objectively unreasonable, he failed to prove any prejudice under *Strickland*

Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (trial counsel not required to "expert shop" for favorable opinion). This testimony was sufficient to raise before the jury the inference of insanity as well as GBMI.

[10]Contrary to his trial testimony, Cantey testified at the PCR hearing that sometimes he and Petitioner would split a half gallon - two gallons of gin. Also, they could also drink between three and four six-packs of beer. Sometimes Respondent drank more than he did, but often they drank the same amount; and Cantey had seen Petitioner drinking with others. **App. 2477-79.**

because he did not prove a reasonable probability of a different result but for counsel's errors. The Order of Dismissal clearly reflects that he applied the "but for" test of *Strickland* when he concluded there was no prejudice and his conclusion is supported by the record. **App. 4725.**

Respondent presented several witnesses at the PCR hearing in support of this allegation, but none demonstrates prejudice under *Strickland*. Under state law, voluntary intoxication or drug use which does not cause defendant to be insane is not defense to murder. *State v. Hartfield*, 388 S.E.2d 802 (S.C.1990). None of Respondent's fact witnesses demonstrate any impairment to this degree. Rather, his evidence in this regard showed speculative evidence of his possible drug or alcohol impairment at the time of the offense from officers who came into contact with him at and after his arrest (their direct examination was impeached by their testimony on cross-examination, and admissions that documents prepared at the time did not include this information)[11] **(App. 2218-34;2374-90; Applicant's Ex. 23)** and recantation testimony from his friend and trial witness, Pressley Cantey.

The principal lay witness offered by Respondent to

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[11] **Applicant's Exhibit 23** contains an incident report prepared by Inv. Jerry Coker, of the Sheriff's Department, in which Coker indicates he and Lt. Abraham spoke with Nance on November 12,1992, after securing a waiver of rights. In this conversation, Nance claimed he did not know of anything about the crimes he was charged with because he was high on drugs at the time. He also said he went to the Fraleys' house on the morning of November 6 "to help them." Counsel made *Brady* and Rule 5 discovery motions but this self-reporting of drug use was not provided to them. Thus, counsel was not deficient in failing to discover this evidence. Also, Nance never said he was high on crack. He had only been arrested for murder several hours earlier, and Lt. Lutcken admitted it was possible that his dazed look was from something other than being under the influence of drugs or alcohol, and therefore, he candidly admitted his direct testimony could have been wrong. **App. 2229-32.**

support this allegation, his friend Pressley Cantey, was never contacted by defense lawyers prior to trial; but he was interviewed by the Sheriff's Department and spoke with the Solicitor for roughly twenty minutes prior to trial. **App. 2483; 2489-90.** According to Cantey, Nance lived across the street from him and they occasionally socialized. Contrary to his trial testimony, Cantey testified at the PCR hearing that sometimes he and Nance would split a half gallon - two gallons of gin. Also, they could also drink between three and four six-packs of beer. **App. 2477-79.** He claimed that he and Nance drank two pints of C. C. or Canadian Mist Whiskey before going to T. J.'s. Cantey testified that they drank a few beers at T. J.'s before he left the bar. On cross-examination, he admitted that he had never seen Nance "falling down drunk" and that Nance was not "falling down drunk" on November 6. Cantey could understand Nance, and Nance appeared to understand Cantey's conversations with him. Also, Nance was not acting peculiar or bizarre, and Cantey did not know why Nance could not remember the telephone number. **App. 2484-89; 2493.** The exhibits introduced through the State's examination of Dr. McKee confirmed his diagnosis of alcohol dependency and borderline intellectual functioning. *See* **Respondent's Exhibits 7-9.**

This record shows that Nance failed to prove any prejudice resulting from counsel's performance under *Strickland.* First, there was overwhelming evidence presented which reasonably tended to establish his guilt for the murder and each of the statutory aggravating circumstances alleged by the State, as previously argued. The jury found all three aggravators alleged by the State: armed robbery, CSC and burglary. Second, none of the PCR evidence reasonably tends to prove that Nance was intoxicated at the time of the offenses. His acquaintances who testified at trial showed, **at best**, that he was drinking beer on November 6, but understood what was going on around him. Likewise, Cantey's PCR testimony does not support Nance's claim of prejudice. His PCR testimony conflicts with that given

at trial and his statements to law enforcement, as evidenced by **Applicant's Exhibit 23** (Det. Coker's supplemental incident report of notes of 11-9-92 interview). It appears that he embellished his testimony in an obvious effort to help his friend who has been sentenced to death, and the PCR judge correctly found that it is not credible. *See United States v. Provost*, 969 F.2d 617, 620 (8th Cir.1992) ("[N]ew trial motions based on recanted testimony are immediately suspect").[12] Under these circumstances, he has failed to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, in either the guilt or sentencing phases of his trial.

Nor was Respondent prejudiced by trial counsel's failure to qualify Dewitt as an expert. *Nance II*, 626 S.E.2d at 881. Although trial counsel failed to move to have Dr. Dewitt qualified as an expert witness, counsel thoroughly developed Dewitt's academic and professional expertise before the jury, **App. 579-80**, and he testified at length concerning his examination of Respondent and his findings as a forensic psychiatrist. Respondent's continued assertion of this allegation, where there clearly was no prejudice in light of Dr. Dewitt's expert testimony without an objection by the State (***e.g.*, App. 579-612; 658-59**), shows that Nance is "grasping at straws" in an effort to show prejudice where clearly none exists. Counsel's failure to adequately prepare Nance's sister, Joan H. Scott, to testify, and her testimony about bad acts he committed without requesting a

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[12]Even if Cantey's testimony is credible, he clearly testified he had never seen Nance "falling down drunk" and that Nance was not "falling down drunk" on November 6. Rather, he could understand Nance and Nance appeared to understand him. Also, Nance was not acting bizarre or peculiar. **App. 2488-92**. As a result, the PCR judge properly found in the alternative that counsel's failure to develop and present this evidence was non-prejudicial since it does not indicate that Petitioner was, in fact, intoxicated on November 6 when he left T. J.'s Bar. *See Strickland.*

limiting instruction on the jury's consideration of this evidence, *see Nance II*, 626 S.E.2d at 881, was not prejudicial for the reasons found by the PCR judge. **App. 4887-95.**

With respect to alleged sentencing phase errors, there was no prejudice resulting from counsel's presentation of mitigating evidence or the brief duration of the defense's sentencing phase case, which was another reason the state supreme court presumed prejudice. *See Nance II*, 626 S.E.2d at 882; **App. 4863-65; 4941-52; 5014-15.** There is no statutory right to an opening statement. *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994).[13] Further, the State did not give an opening, which lessens the possibility of any prejudice. Nor was it deficient or prejudicial to rely on the mental health evidence already presented to the jury in the guilt phase. *Noland v. French*, 134 F.3d 208, 218 (4th Cir. 1998). Finally, Nance has not shown prejudice, especially given the overwhelming nature of the aggravating factors since assessing prejudice requires this Court to "reweigh the evidence in aggravation against the totality of available mitigating evidence"). *Wiggins*, 539 U.S. at 534.

Counsel's closing sentencing phase argument also does not provide a basis for relief. Nance claims that counsel did not ask for mercy or a life sentence, but only argued that he was a "sick man" who did "sick" things. *See Nance*, 626 S.E.2d at 883; Yet, when placed in context, counsel was arguing that Nance was sick because "the man has a mental problem, he's had it for sometime." **App. 778B.** This argument, which came after counsel had reviewed the mental health evidence, related some of Nance's more bizarre acts, and stated that Nance had been seeking help for

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[13]Case law seems to be unanimous that failure to give an opening statement is not a basis for successfully establishing either prong of *Strickland*, even if unusual, since it is essentially tactical in nature. *E.g., Huffington v. Nuth*, 140 F.3d 572, 583 (4th Cir. 1998); *Nguyen v. Reynolds*, 131 F.3d 1340, 1350 (10th Cir. 1997).

some time, respected the weight of the aggravating evidence and the jury's guilt phase verdict, which would enhance counsel's credibility, but still contended that Mr. Nance was "sick", implying difficulties beyond Nance's control. Surely, this argument could not possibly be considered deficient or prejudicial. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637, (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury ... will draw that meaning from the plethora of less damaging interpretations"). Finally, Nance cannot show prejudice under *Wiggins* from anything else counsel might have said in closing, especially given the overwhelming weight of the aggravating factors.[14]

Further, Nance was not prejudiced by counsel's failure to present evidence that he and his family had a history of mental illness and that he supposedly has neurological dysfunction. **Brief**

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[14] *See, e.g., Moore v. Reynolds*, 153 F.3d 1086 (10th Cir. 1998). Nance is not entitled to relief based upon by trial counsel failing to ensure that he was taken off of Haldol in accordance with the trial court's pretrial order or for failing to move for a continuance or mistrial upon discovering that he was still receiving Haldol for the reasons found by the PCR court. **App. 4685-90**. Contrary to Nance's assertion, his non-testimonial assertion of witness lied, **App. 409, ll. 3-11**, does inferentially admit guilt. Moreover, it shows that he was aware of what he had done and that the crimes were not the product of mental illness or psychosis, despite any "spin" put on the statement by collateral counsel and their experts. *Contra Nance II*, 626 S.E.2d at 882 & nn. 5-6. Assuming *arguendo* that counsel's performance was somehow deficient, Nance still failed to prove a reasonable likelihood of a different result but for counsel's testimony. The trial court alternatively rejected his new trial motion on the merits. **App. 892-904**. The state supreme court also squarely rejected the trial court's denial of the new trial motion on the merits. *State v. Nance*, 466 S.E.2d at 507. And, the only evidence presented to the trial court was that Nance was not forcibly medicated but voluntarily took the Haldol when it was presented to him, and he did not testify at PCR or present other evidence to create a factual dispute in this regard.

of Respondent pp. 106-13. *Strickland*, 466 U.S. at 694; *Wiggins*. In light of the State's evidence proving that Nance committed the murder and the accompanying aggravating circumstances, the trial court submitted the statutory aggravating circumstances of burglary, criminal sexual conduct and armed robbery. Based upon the evidence presented by trial counsel, the trial court submitted the statutory mitigating circumstances found in S.C. code Ann. § 16-3-20(C)(b)(2)(6)-(7) (Supp. 2006). **App. 776-86**. The jury found the existence of all three statutory aggravating circumstances. **App. 794**. The trial court thereafter found as an affirmative fact that the evidence of the case warranted imposition of the death penalty and that its imposition was not the result of prejudice, passion or any other arbitrary factor. **App. 798**.

The PCR testimony of Nance's experts, Dr. Evans and Dr. Woods was that Nance (1) is schizophrenic; (2) has frontal lobe damage; and (3) he is neurologically impaired. Dr. Woods also opined that Nance was suffering from an alcohol blackout at the time of the crime and, in his estimation, was, therefore, "GBMI" under Dr. Woods' understanding of this term. However, counsel's failure to present the testimony of Drs. Evans and Woods in the penalty phase was non-prejudicial. First, the PCR judge found that much of their testimony was not credible[15]. Woods also misapplied the test for determining whether someone in South Carolina is GBMI. *See State v. Wilson*, 413 S.E.2d 923 (S.C. 1992)a defendant is not GBMI unless he acts under an irresistible impulse; and, Woods unequivocally indicated that Nance was not acting under an irresistible impulse. **App. 4848 n. 90;4850 & n. 93; 4853**. The bottom line with Nance's PCR showing is that

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[15]For instance, the PCR judge found that Dr. Woods' testimony was undermined because he relied upon information in a discovery deposition that was not subjected to in-court cross-examination, and Nance did not present any of the medical or school records upon which he relied in reaching his conclusions; so it was impossible for the PCR judge to accurately assess his credibility. Evans' testimony was discounted for similar reasons.

neither Evans' testimony nor that of Woods would have supported this guilt phase defense; and if trial counsel had relied upon these witnesses, as opposed to presenting the guilt phase testimony of Dr. Dewitt, they would not have received the insanity or GBMI instructions, and there would not have been a guilt phase defense. *Hartfield, supra* (voluntary intoxication or drug use which does not cause defendant to be insane is not defense to murder).[16]

Nor can Nance show any prejudice from the failure to present such evidence in the penalty phase, in addition to Dr. Dewitt's guilt phase testimony. The penalty phase jury would only have heard questionable evidence concerning frontal lobe damage and neurological impairments which would have been exacerbated by drinking[17]. Moreover, the PCR judge's findings that the facts of the case refute any suggestion Nance was so intoxicated that he did not understand his actions and that his actions leading up to the murder seem to belie any neurological impairment are supported by the record. Therefore, the only credible evidence is that testified to by the State's examiners, Drs. Sheth and McKee.[18] Worse, if counsel had presented their

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[16]The evidence of adaptability to prison Nance claims counsel should have presented clearly undercut the credibility of the mental health evidence he also asserts should have been offered. He did not merely adapt to prison, he excelled at a time all his experts agreed we should have seen onset of schizophrenia. Rather than exacerbate the prejudice of one issue, it mitigates any supposed prejudice.

[17]Mr. Hinnant's PCR testimony, however, reflects that he generally did not favor similar defenses in his many years of practice. **App. 2678-79**.

[18]Nevertheless, Mrs. Scott clearly testified that Nance blacked out while drinking; there was evidence presented that he was a "heavy drinker" and there was evidence presented that he had been drinking on the night of the murder. Also, Dr. McKee had diagnosed Nance as alcohol dependent, and Dr. Dewitt testified that Nance had previously been hospitalized for treatment for alcoholism. Thus, trial counsel presented some of the evidence to the jury

testimony in the penalty phase, there would have been a dramatic and irreconcilable conflict between Nance 's experts' opinions as to his mental state at the time of the offense, which the State could have easily and effectively exploited to ensure that Petitioner received the death penalty. Thus, "there is no reasonable probability the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death. *Wiggins*. Rather, presentation of this evidence would have only increased the chances the sentencer would recommend death, and Nance failed to establish prejudice. *Id.*[19]

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which Respondent now contends they were deficient for not presenting. Further, presentation of testimony from Drs. Woods and Evans would not have resulted in the trial court submitting any additional statutory mitigating circumstances which were not submitted based upon the evidence presented by trial counsel.

[19] Nor did Nance prove prejudice from counsel's failure to present "mitigating social history evidence to explain his odd childhood behavior to which his sister referred to during the guilt phase." *Nance II*, 626 S.E.2d at 883. Petitioner submits that the PCR judge properly applied *Strickland* and its progeny when he found that Nance failed to prove either deficient performance or prejudice resulting from counsel's alleged failure to adequately investigate and present evidence concerning his childhood and background in mitigation of punishment. **App. 4895-4907**. Also, there was no prejudice from the failure to present evidence of adaptability to prison at sentencing. *See Nance II*, 626 S.E.2d at 883. Each witness presented in the PCR hearing proceedings clearly stated that he or she would not consider an inmate a "model prisoner" if the inmate threw urine on a guard and threatened the guard. So, the one episode undermines adaptability. More importantly, the information provided by these witnesses would have dramatically undercut the credibility of Dr. Dewitt's testimony that Nance was schizophrenic and GBMI because this evidence would have shown that he excelled when previously incarcerated, at a time when he should have been displaying signs of schizophrenia, even though he was not being treated or medicated. *See Diagnostic and Statistic Manual of Mental Disorders* (4th ed.), American Psychiatric Association, 1994 (DSM-IV), p. 282 (median age for onset of the first psychotic episode of schizophrenia is in the early to mid-twenties for men).

Therefore, this Court should grant certiorari.

CONCLUSION

For the reasons set forth above, Petitioner respectfully aks this Court to grant the Petition for Writ of Certiorari to review the judgment of the state supreme court. Alternatively, the judgment of the state court should be summarily reversed.

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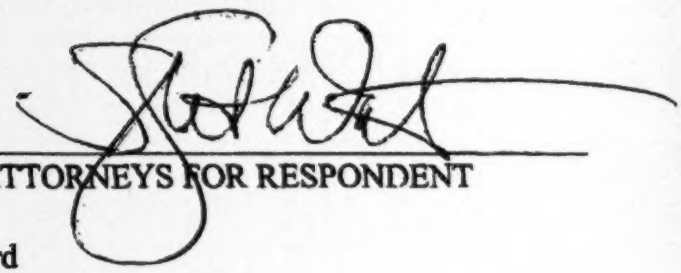

By: _____
ATTORNEYS FOR RESPONDENT

* Counsel of Record
June 6, 2006.

APPENDIX I

367 S.C. 547, 626 S.E.2d 878
(Cite as 626 S.E.2d 878)

Supreme Court of South Carolina.
Robert Lee NANCE, Petitioner,
v.
Jon E. OZMINT, Director, South Carolina Department of Corrections, Respondent.
No. 26101.

Heard Nov. 15, 2005.
Decided Jan. 30, 2006.
Rehearing Denied March 8, 2006.

***878** Teresa L. Norris, of Center for Capital Litigation, and William Norman Nettles, both of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, of Columbia, for Respondent.

Chief Justice TOAL:

Robert Lee Nance (Petitioner), sentenced to death for murder, appealed from the post-conviction relief (PCR) court's denial of his application for relief. This Court held that the manner in which Petitioner's trial counsel investigated, planned, and conducted his defense constituted a classic example of a complete breakdown in the adversarial process. As a result, this Court granted Petitioner a new trial. However, the United States Supreme Court vacated this Court's judgment and remanded this case for consideration in light of *Florida v. Nixon*. [FN1]

FN1. *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160

L.Ed.2d 565 (2004).

*879FACTUAL / PROCEDURAL BACKGROUND

The facts surrounding the incident are not in dispute and are outlined in this Court's previous opinion:

> The victims, Robert and Violet Fraley, were attacked at home where they lived alone. [FN2] On the night of the intrusion, Mr. Fraley testified that he and his wife went to bed around 9:30 or 10:00 p.m. Mr. Fraley awoke to the sound of someone knocking on the front door of the house. Mr. Fraley testified that he saw a man standing on the porch, and that the man asked him if he could come in to use the phone because his truck had broken down. Mr. Fraley told him he could use the phone outside in his shop. When the man said he did not have a light to see his way to the shed, Mr. Fraley left the door to get him a flashlight. Mr. Fraley testified that when he unlatched the door to hand over the light, the man forced the door open and immediately began stabbing him with a screwdriver.
>
> FN2. Mr. and Mrs. Fraley were 78 and 73 years old respectively at the time of the attack.
>
> At some point, Mrs. Fraley entered the room and tried to help Mr. Fraley as he tried unsuccessfully to get away from the intruder. Mr. Fraley was bleeding profusely and his wife was trying to wipe up blood while the intruder was demanding money and the keys to their car. Mrs. Fraley retrieved both of their wallets and their keys and gave approximately $194 in cash and the keys to the intruder. Mr. Fraley testified that he pleaded with the intruder not to kill him and his wife, but that the intruder replied that he was going to kill both of them. The intruder then raped and killed Mrs. Fraley. Miraculously, Mr. Fraley survived the attack but was hospitalized for thirteen days. Petitioner was arrested in the early morning hours following the attack after he was pulled over driving the Fraleys' Cadillac. There was blood on his clothes that was later determined to be

Mrs. Fraley's. The car also contained a bank envelope that was taken from the Fraleys' home during the attack. Two people were in the car with Petitioner when he was stopped. One person fled the scene and was never apprehended. The other person, Erskine Green, testified at Petitioner's trial that he did not know Petitioner and that Petitioner had picked him and the other man up on the side of the road.

Petitioner was convicted of murder, criminal sexual conduct (CSC) in the first degree, first-degree burglary, assault and battery with intent to kill (ABIK), and armed robbery. He was sentenced to death on the murder charge. He was also sentenced to life for burglary, thirty years for CSC, twenty years for ABIK, and twenty-five years for armed robbery. His convictions and sentences were affirmed on direct appeal. *State v. Nance*, 320 S.C. 501, 466 S.E.2d 349 (1996). Subsequently, Petitioner filed a PCR application. The PCR court denied relief and Petitioner appealed.

This Court granted relief relying on *United States v. Cronic* [FN3] because Petitioner did not receive effective assistance of counsel due to the failure of counsel to challenge the prosecution's case against Petitioner. *Nance v. Frederick*, 358 S.C. 480, 596 S.E.2d 62 (2004). The Court held that the case represented "a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of Petitioner's trial." *Id.* at 488, 596 S.E.2d at 66.

> FN3. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The United States Supreme Court vacated this Court's judgment and remanded the case in light of *Florida v. Nixon*. In *Nixon*, the Court held that presumed prejudice as outlined by *Cronic* is reserved for cases in which counsel fails to meaningfully oppose

the prosecution's case. *Nixon*, 543 U.S. at 190, 125 S.Ct. at 562. Accordingly, the following issue is presented to this Court for review:

What is the impact of *Florida v. Nixon* on this case?

LAW/ANALYSIS

Cronic and *Strickland*

Petitioner argues that this Court should hold that counsel was ineffective and grant relief. We agree.

***880** "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

The Sixth Amendment guarantees that every criminal defendant shall receive "Assistance of Counsel" in establishing his defense. U.S. Const. amend. VI. On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that a criminal defendant receive *effective* assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Strickland and *Cronic* are companion cases applying the same analysis, but with a different emphasis. Both *Strickland* and *Cronic* direct that a defendant must ordinarily make two showings in order to prevail on an ineffective assistance claim. "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Cronic*, 466 U.S. at 666, 104 S.Ct. 2039 (explaining that absent specific "circumstances mak[ing] it unlikely that the defendant could have received the effective assistance," he can make out an ineffective assistance claim "only by pointing to specific errors made by trial counsel"). This requires the defendant to demonstrate that

"counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052; *Cronic*, 466 U.S. at 666 n. 41, 104 S.Ct. 2039 (noting that "claims based on specified errors ... should be evaluated under the standards enunciated in *Strickland*"). "Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

[1] The Supreme Court also recognized in both *Strickland* and *Cronic* that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry ... is not worth the cost." *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052 (citing *Cronic*, 466 U.S. at 658, 104 S.Ct. 2039). In *Cronic*, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." *Brown v. French*, 147 F.3d 307, 313 (4th Cir.1998).

[2] Absent these narrow circumstances of presumed prejudice under Cronic, defendants must show actual prejudice under

Strickland. See *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052; *Cronic*, 466 U.S. at 666 and n. 41, 104 S.Ct. 2039. Actual prejudice requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Florida v. Nixon reaffirmed the notion that per-se prejudice occurs infrequently. In *Nixon*, the United States Supreme Court held that entering a guilty plea on behalf of a defendant without his express consent did not constitute ineffective assistance of counsel. *Nixon*, 543 U.S. at 190-91, 125 S.Ct. at 562. The Court opined that the decision to plead guilty was a strategy employed by trial counsel in an effort to present mitigating evidence at sentencing in an attempt to save the defendant's life. *Id.* at 190-92, 125 S.Ct. ***881** at 562-63. Further, the Court held that *Cronic's* presumed prejudice standard was only used for those cases where counsel fails to "function in any meaningful sense as the Government's adversary." *Id.* at 190, 125 S.Ct. at 562.

[3] In light of the recent holding in *Nixon*, we believe the present case represents one of the rare cases where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." Moreover, counsel did not act as an adversary to the prosecution's case, but instead helped to bolster the case *against* his client.

This Court's previous opinion set forth the following in an effort to detail the deficiencies in counsel's representation:

TRIAL PRESENTATION

Following Petitioner's arrest, defense counsel was appointed as Petitioner's lead counsel. At the time he was appointed, defense counsel had either recently suffered from or was then suffering

from pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure. During the trial he was taking various prescription medications, including Valium, Lopressor, Isocet, and Tenormin. At the PCR hearing, Petitioner's experts testified that the side effects of those medications included impaired memory, lack of sleep, and sedation. Defense counsel's testimony at the PCR hearing indicated that he remembered very little from the trial that took place 5 years before the PCR hearing.

An attorney, who had only been practicing law for eighteen months, was appointed as co-counsel. Co-counsel testified at the PCR hearing that Petitioner's mother was the only family member who was interviewed prior to trial; that he did not recall that anyone investigated Petitioner's background; and that no one had requested Petitioner's records from the Department of Corrections.

The psychologist who planned to offer expert testimony concerning Petitioner's mental health, Dr. Dewitt (Dewitt), asked defense counsel for Petitioner's medical records, social history, statements from family members, and statements from the Department of Corrections staff but never received them. He received Petitioner's hospital records a few hours before trial.

GUILT PHASE

When introducing himself in his opening statement to the jury, co-counsel said, "I did not ask [to represent the Petitioner], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either. He was just appointed to represent Mr. Nance." In addition, defense counsel presented only three witnesses to testify on behalf of Petitioner's defense: a corrections officer, an unqualified expert, and Petitioner's sister. Defense counsel's first witness, a Florence County detention center officer, testified that while in prison, Petitioner threw urine at a female corrections officer. [FN4] On cross-examination, the officer testified that this episode was Petitioner's only incident of misbehavior during the

seven-month period that Petitioner was under his watch.

> FN4. At the PCR hearing, Petitioner's PCR counsel presented testimony that the reason why Petitioner threw urine at the female office was because she reminded him of his aunt.

The defense's second witness, Dewitt, testified about Petitioner's mental health. Based on only two meetings with the Petitioner, Dewitt opined that Petitioner more closely resembled a criminal who was guilty but mentally ill. Defense counsel was not successful in qualifying Dewitt as an expert.

The defense rested after Dewitt's testimony. The trial judge then granted defense counsel's request to reopen his presentation so that Petitioner's sister could testify. Defense counsel failed to prepare the sister's testimony but asked that she testify about Petitioner's childhood. The sister testified that Petitioner was an abnormal child: pretending to be an undertaker, he buried one of his brothers; pulled a gun on their father; stabbed himself with a broken bottle; and killed their pets.

In sum, the testimony that defense counsel presented in Petitioner's guilt phase defense consisted of testimony of a corrections officer concerning the only incident of misconduct that Petitioner committed *882 while incarcerated; an opinion by an uninformed psychiatrist who was not qualified as an expert; and unprepared testimony of Petitioner's sister about Petitioner's oddities as a child.

SENTENCING PHASE

Defense counsel's mitigation presentation during the sentencing phase of the trial lasted seven minutes. Counsel began by waiving the opening statement and then incorporated the meager amount of defense testimony elicited during the guilt phase.

Defense counsel then presented the testimony of a corrections officer of the Florence Detention Center, who testified that Petitioner was taking two prescription medications, Cogentin

and Haldol, and that Petitioner had taken Haldol that morning. [FN5] Counsel presented no further testimony, to which the trial judge responded by asking, "Are you ready to go to the jury?" Counsel responded, "We incorporate what we feel, Your Honor--the doctor and the other testimony by the sister would be repetitious." The judge then replied, "Do you need any time to collect your thoughts? This is rather quick." [FN6] Co-counsel gave the closing argument, refusing to plead for Petitioner's life and referring to Petitioner as a "sick" man who did "sick things."

> FN5. The trial judge forbade Petitioner from taking any antipsychotic drugs during trial. Haldol is a very strong antipsychotic drug used in the treatment of acute schizophrenia and acute psychosis, controlling a patient's tendency towards aggression and agitation. http://www.psyweb. com/Drughtm/halope. html

> FN6. This is an example of the trial judge's commendable attempt to insure that defense counsel was effectively representing his client. Unfortunately, the trial judge's ability to hold defense counsel to his constitutional obligation to effectively represent his client was greatly limited by (1) the desultory manner in which defense counsel tried this case and (2) the fact that at the time this case was tried, South Carolina common law provided little guidance as to what constituted an attorney's complete failure to provide effective representation. We hope that this opinion provides some clarity as to what does *not* constitute effective representation.

We find that this trial presentation, in its entirety, represents a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of Petitioner's trial. For the reasons set forth below, we

presume Petitioner was prejudiced, and accordingly, grant him a new trial.

First, Petitioner was disadvantaged from the outset because lead defense counsel was in ill health and on heavy medication, and co-counsel had only practiced law for eighteen months.
Second, in aid of its claim that Petitioner was mentally ill, the defense had wanted Petitioner to appear in the courtroom in his natural demeanor, unaffected by the administration of psychotropic drugs. The defense was successful in getting the trial judge to order such. Nevertheless, defense counsel failed to inform the jail personnel of the trial judge's order that Petitioner be taken off the anti-psychotic drug, Haldol. Consequently, Petitioner remained in a drug-influenced demeanor during the entire trial, and the jury never observed his natural demeanor.
Third, the trial had just begun when co-counsel communicated to the jury that neither he nor defense counsel wanted to be there.
Fourth, while defense counsel may have been pursuing a defense of guilty but mentally ill (GBMI), [FN7] he failed to qualify his own expert. Further, by eliciting the unprepared testimony of Petitioner's sister only *after* defense psychologist Dewitt testified, defense counsel failed to give his unqualified expert, at minimum, the opportunity to inform the jury of how the sister's testimony of Petitioner's mental irregularities as a child could lead to a conclusion that Petitioner was mentally ill at the time of the murder.

> FN7. Dewitt testified that Petitioner's mental incapacity did not rise to the level of the *M'Naughten* standard for insanity but did opine that he met the standard for GBMI. Despite evidence of Petitioner's mental incapacity, defense counsel failed to raise the issue of whether Petitioner was competent to stand trial.

Fifth, defense counsel presented no adaptability evidence at the

sentencing *883 hearing. In fact, by merely incorporating the testimony elicited from the guilt phase, defense counsel gave the impression that Petitioner had not adapted to confinement, because the only evidence that had been presented concerning his confinement was the urine-throwing incident.

During the PCR hearing, Petitioner presented testimony to show that the urine-throwing incident was the only instance of bad behavior during confinement. In fact, Petitioner was selected as the Manning Correctional Institution's inmate of the year and was nominated for the Department of Corrections' inmate of the year. He also sang in the prison choir and participated in other Christian activities. A jail administrator and prison minister testified that Petitioner was a model inmate. Defense counsel could have easily discovered this adaptability evidence prior to trial but failed to do so. [FN8]

> FN8. The United States Supreme Court has recently recognized that defense counsel must conduct a reasonable investigation "to discover *all reasonably available* mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524-25, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted).

Sixth, defense counsel presented no mitigating social history evidence to explain the Petitioner's odd childhood behavior to which his sister referred to during the guilt phase. Defense counsel failed to reveal that Petitioner was beaten throughout his childhood; his father was an alcoholic who fought with many family members; he was treated with alcohol as a child in lieu of over-the-counter medication; and he grew up in a family of extreme poverty and physical deprivation.

Seventh, defense counsel's seven-minute mitigation presentation failed to provide the jury with any insight concerning Petitioner's mental illness. At the PCR hearing, Petitioner introduced evidence that he has a family history of

schizophrenia, he has a history of hearing voices in his head, and he has suffered neurological damage.
Finally, during the closing argument, co-counsel failed to plead for Petitioner's life and referred to him as a "sick" man.
Nance, 358 S.C. at 485-88, 596 S.E.2d at 65-66.

The above outlined trial presentation details the complete failure to conduct a defense by trial counsel. We hold that this case represents a very rare situation where counsel failed to provide an adversarial challenge to the prosecution. We find it most compelling that in the present case counsel abandoned his role as defense counsel and in fact helped to bolster the case against his client. In particular, counsel's statement that his client was "a sick man" who has done "sick things" points to the fact that he was not acting as defense counsel and failed "to function ... as the Government's adversary." *See Jones v. Barnes*, 463 U.S. 745, 758, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (stating that in order to satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court); *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979) (stating that an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation). In addition, counsel called a defense witness who testified about Petitioner's one incident of misbehavior in jail. Finally, Petitioner's sister testified as to his propensity for killing animals as a child. These witnesses, in addition to counsel's opening and closing statements, helped to further bolster the prosecution's case against Petitioner rather than providing him with a defense.

We again recognize that this type of "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.' " *Nance*, 358 S.C. at 490, 596

S.E.2d at 67. (citing *Frett v. State*, 298 S.C. 54, 56, 378 S.E.2d 249, 251 (1988)). As a result, we hold that counsel was ineffective under *Cronic* and failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client.

CONCLUSION

Based on the above reasoning, we again reverse the PCR's decision to deny relief *884 after reconsideration of the issue in light of *Florida v. Nixon*.

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice JAMES C. WILLIAMS concur.

APPENDIX II

Supreme Court of South Carolina.

Robert Lee **NANCE**, Petitioner,

v.

R. Dodge FREDERICK, Director, South Carolina Department of Corrections,

Respondent.

Petition for Rehearing is denied.

March 8, 2006.

APPENDIX III

543 U.S. 1043, 125 S.Ct. 868 (Mem), 160 L.Ed.2d 763, 73 USLW 3146, 73 USLW 3386, 73 USLW 3396, 05 Cal. Daily Op. Serv. 211

Supreme Court of the United States

Jon E. OZMINT, Director, South Carolina Department of Corrections, petitioner,

v.

Robert Lee NANCE.

No. 04-273.

Jan. 10, 2005.

Case below, *Nance v. Frederick*, 358 S.C. 480, 596 S.E.2d 62.

On petition for writ of certiorari to the Supreme Court of South Carolina. Motion of respondent for leave to proceed *in forma* ****869** *pauperis* granted. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of South Carolina for further consideration in light of *Florida v. Nixon*, 534 U.S. ----, --- S.Ct. ----, --- L.Ed.2d ---- (2004).
U.S.,2005

APPENDIX IV

596 S.E.2d 62
358 S.C. 480, 596 S.E.2d 62
(Cite as: 358 S.C. 480, 596 S.E.2d 62)

Supreme Court of South Carolina.

Robert Lee **NANCE**, Petitioner,
v.
R. Dodge FREDERICK, Director, South Carolina Department of Corrections,
Respondent.

No. 25814.

Heard Feb. 5, 2003.
Decided April 26, 2004.
Rehearing Denied May 25, 2004.

****63 *482** Teresa L. Norris, Maura McNally, William Norman Nettles, and South Carolina Office of Appellate Defense, all of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General S. Creighton Waters, all of Columbia, for Respondent.

Chief Justice TOAL.

Robert Lee Nance (Petitioner), sentenced to death for murder, appeals from the post-conviction relief (PCR) court's denial of his application for PCR. We hold that the manner in which Petitioner's trial counsel investigated, planned, and conducted his

defense constitutes a classic example of a complete breakdown in the adversarial process. Therefore, we grant Petitioner a new trial.

FACTUAL / PROCEDURAL BACKGROUND

The victims, Robert and Violet Fraley, were attacked at home where they lived alone. [FN1] On the night of the intrusion, Mr. Fraley testified that he and his wife went to bed around 9:30 or 10:00 p.m. Mr. Fraley awoke to the sound of someone knocking on the front door of the house. Mr. Fraley testified that he saw a man standing on the porch, and that the man asked him if he could come in to use the phone because his truck had broken down. Mr. Fraley told him he could use the phone outside in his shop. When the man said he did not have a light to see his way to the shed, Mr. Fraley left the door to get him a flashlight. Mr. Fraley testified that when he unlatched the door to hand over the light, the man forced the door open and immediately began stabbing him with a screwdriver.

> FN1. Mr. and Mrs. Fraley were 78 and 73 years old respectively at the time of the attack.

*483 At some point, Mrs. Fraley entered the room and tried to help Mr. Fraley as he tried unsuccessfully to get away from the intruder. Mr. Fraley was bleeding profusely and his wife was trying to wipe up blood while the intruder was demanding money and the keys to their car. Mrs. Fraley retrieved both of their wallets and their keys and gave approximately $194 in cash and the keys to the intruder. Mr. Fraley testified that he pleaded with the intruder not to kill him and his wife, but that the intruder replied that he was going to kill both of them. The intruder then raped and killed Mrs. Fraley. Miraculously, Mr. Fraley survived the attack but was hospitalized for thirteen days.

Petitioner was arrested in the early morning hours following the

attack after he was pulled over driving the Fraleys' Cadillac. There was blood on his clothes that was later determined to be Mrs. Fraley's. The car also contained a bank envelope that was taken from the Fraleys' home during the attack. Two people were in the car with Petitioner when he was stopped. One person fled the scene and was never apprehended. The other person, Erskine Green, testified at Petitioner's trial that he did not know Petitioner and that Petitioner had picked him and the other man up on the side of the road.

Petitioner was convicted of murder, criminal sexual conduct (CSC) in the first degree, first-degree burglary, assault and battery with intent to kill (ABIK), and armed robbery. He was sentenced to death on the murder charge. He was also sentenced to life for burglary, thirty years for CSC, twenty years for ABIK, and twenty-five years for armed robbery. His convictions and sentences were affirmed on direct appeal. *State v. Nance,* 320 S.C. 501, 466 S.E.2d 349 (1996). Subsequently, Petitioner filed a PCR application. The PCR court denied relief, and Petitioner asks this Court for relief on both the guilt and sentencing phases of his trial.

Petitioner has submitted many issues for review, challenging many of his counsel's actions and lack of actions during trial, but, in our view, the essential issue in this case is as follows:

> **64 Did the PCR judge err in finding that Petitioner's Sixth and Fourteenth Amendment rights to counsel were not violated *484 because defense counsel failed to sufficiently investigate, prepare and present the case?

LAW/ANALYSIS

Petitioner claims that the PCR judge erred in finding that his defense counsel were not ineffective for failing to prepare and present the case as required under the Sixth Amendment. We agree.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975).

The Sixth Amendment guarantees that every criminal defendant shall receive "Assistance of Counsel" in establishing his defense. U.S. Const. amend. VI. On May 14, 1984, the United States Supreme Court handed down two opinions holding that the Sixth Amendment requires that the criminal defendant receive *effective* assistance of counsel. *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In *Cronic,* the Court characterized the protection that the Sixth Amendment affords the defendant:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

466 U.S. at 656-657, 104 S.Ct. at 2045-2046 (citations omitted).

In *Strickland,* the Court set forth a two-part test for evaluating the effectiveness of the criminal defendant's attorney. ***485** To receive a new trial on the grounds of ineffectiveness of counsel, the petitioner must prove (1) that his counsel's representation was deficient, and (2) that there is a reasonable probability that

counsel's deficient conduct prejudiced the outcome of petitioner's trial. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068.

[1] The Court stated in *Cronic* that there are three circumstances in which the defendant's representation is so inadequate that the second element of the *Strickland* test, the prejudice element, can be presumed. *Cronic,* 466 U.S. at 658-659, 104 S.Ct. at 2039.

The first scenario in which prejudice is presumed is when there is a "complete denial of counsel," which occurs when a trial is rendered unfair because the defendant is denied assistance of counsel during a "critical stage" of his trial. *Id.*

In the second scenario, prejudice is presumed if "counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing." When there has been no meaningful adversarial testing, then "the adversary process itself [is] presumptively unreliable." *Id.* In *Bell v. Cone,* the U.S. Supreme Court explained further that "the attorney's failure [to test the prosecutor's case] must be complete" for this standard to be met. 535 U.S. 685, 697, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002).

Third, prejudice is presumed when circumstances dictate that no attorney could render effective assistance of counsel. *Cronic,* 466 U.S. at 659-662, 104 S.Ct. at 2047-2048. [FN2]

> FN2. The Fourth Circuit has held that the presumption of prejudice as defined by *Cronic* only applies in extraordinary circumstances. *Young v. Catoe,* 205 F.3d 750 (4th Cir.2000). Otherwise, when prejudice is not presumed, the *Strickland* standard applies. *Id.*

We now apply the *Cronic* analysis to the case at hand.

****65** TRIAL PRESENTATION

[2] Following Petitioner's arrest, defense counsel was appointed as Petitioner's lead counsel. At the time he was appointed, defense counsel had either recently suffered from or was then suffering from pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure. During the trial he *486 was taking various prescription medications, including Valium, Lopressor, Isocet, and Tenormin. At the PCR hearing, Petitioner's experts testified that the side effects of those medications included impaired memory, lack of sleep, and sedation. Defense counsel's testimony at the PCR hearing indicated that he remembered very little from the trial that took place 5 years before the PCR hearing.

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The psychologist who planned to offer expert testimony concerning Petitioner's mental health, Dr. Dewitt (Dewitt), asked defense counsel for Petitioner's medical records, social history, statements from family members, and statements from the Department of Corrections staff but never received them. He received Petitioner's hospital records a few hours before trial.

GUILT PHASE

When introducing himself in his opening statement to the jury, co-counsel said, "I did not ask [to represent the Petitioner], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either. He was just appointed to represent Mr. Nance." In addition, defense counsel presented only three witnesses to testify on behalf of Petitioner's defense: a corrections officer, an unqualified expert, and Petitioner's sister.

Defense counsel's first witness, a Florence County detention center officer, testified that while in prison, Petitioner threw urine at a female corrections officer. [FN3] On cross-examination, the officer testified that this episode was Petitioner's only incident of misbehavior during the seven-month period that Petitioner was under his watch.

> FN3. At the PCR hearing, Petitioner's PCR counsel presented testimony that the reason why Petitioner threw urine at the female office was because she reminded him of his aunt.

*487 The defense's second witness, Dewitt, testified about Petitioner's mental health. Based on only two meetings with the Petitioner, Dewitt opined that Petitioner more closely resembled a criminal who was guilty but mentally ill. Defense counsel was not successful in qualifying Dewitt as an expert.

The defense rested after Dewitt's testimony. The trial judge then granted defense counsel's request to reopen his presentation so that Petitioner's sister could testify. Defense counsel failed to prepare the sister's testimony but asked that she testify about Petitioner's childhood. The sister testified that Petitioner was an abnormal child: pretending to be an undertaker, he buried one of his brothers; pulled a gun on their father; stabbed himself with a broken bottle; and killed their pets.

In sum, the testimony that defense counsel presented in Petitioner's guilt phase defense consisted of testimony of a corrections officer concerning the only incident of misconduct that Petitioner committed while incarcerated; an opinion by an uninformed psychiatrist who was not qualified as an expert; and unprepared testimony of Petitioner's sister about Petitioner's oddities as a child.

SENTENCING PHASE

Defense counsel's mitigation presentation during the sentencing phase of the trial lasted seven minutes. Counsel began by waiving the opening statement and then incorporated the meager amount of defense testimony elicited during the guilt phase.

Defense counsel then presented the testimony of a corrections officer of the Florence Detention Center, who testified that Petitioner was taking two prescription medications, Cogentin and Haldol, and that Petitioner had **66 taken Haldol that morning. [FN4] Counsel presented no further testimony, to which the trial judge responded by asking, "Are you ready to go to the jury?" Counsel responded, "We incorporate what we feel, *488 Your Honor--the doctor and the other testimony by the sister would be repetitious." The judge then replied, "Do you need any time to collect your thoughts? This is rather quick." [FN5] Co-counsel gave the closing argument, refusing to plead for Petitioner's life and referring to Petitioner as a "sick" man who did "sick things."

FN4. The trial judge forbade Petitioner from taking any antipsychotic drugs during trial. Haldol is a very strong antipsychotic drug used in the treatment of acute schizophrenia and acute psychosis, controlling a patient's tendency towards aggression and agitation. http://www.psyweb.com/Drughtm/halope.html

FN5. This is an example of the trial judge's commendable attempt to insure that defense counsel was effectively representing his client. Unfortunately, the trial judge's ability to hold defense counsel to his constitutional obligation to effectively represent his client was greatly limited by (1) the desultory manner in which defense counsel tried this case and (2) the fact that at the time this case was tried, South Carolina common law provided little guidance as to what constituted an attorney's complete failure to provide effective representation. We

hope that this opinion provides some clarity as to what does *not* constitute effective representation.

We find that this trial presentation, in its entirety, represents a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of Petitioner's trial. For the reasons set forth below, we presume Petitioner was prejudiced, and accordingly, grant him a new trial.

First, Petitioner was disadvantaged from the outset because lead defense counsel was in ill health and on heavy medication, and co-counsel had only practiced law for eighteen months.

Second, in aid of its claim that Petitioner was mentally ill, the defense had wanted Petitioner to appear in the courtroom in his natural demeanor, unaffected by the administration of psychotropic drugs. The defense was successful in getting the trial judge to order such. Nevertheless, defense counsel failed to inform the jail personnel of the trial judge's order that Petitioner be taken off the anti-psychotic drug, Haldol. Consequently, Petitioner remained in a drug-influenced demeanor during the entire trial, and the jury never observed his natural demeanor.

Third, the trial had just begun when co-counsel communicated to the jury that neither he nor defense counsel wanted to be there.

*489 Fourth, while defense counsel may have been pursuing a defense of guilty but mentally ill (GBMI), [FN6] he failed to qualify his own expert. Further, by eliciting the unprepared testimony of Petitioner's sister only *after* defense psychologist Dewitt testified, defense counsel failed to give his unqualified expert, at minimum, the opportunity to inform the jury of how the sister's testimony of Petitioner's mental irregularities as a child could lead to a conclusion that Petitioner was mentally ill at the time of the murder.

FN6. Dewitt testified that Petitioner's mental incapacity did not rise to the level of the *M'Naughten* standard for insanity but did opine that he met the standard for GBMI. Despite evidence of Petitioner's mental incapacity, defense counsel failed to raise the issue of whether Petitioner was competent to stand trial.

Fifth, defense counsel presented no adaptability evidence at the sentencing hearing. In fact, by merely incorporating the testimony elicited from the guilt phase, defense counsel gave the impression that Petitioner had not adapted to confinement, because the only evidence that had been presented concerning his confinement was the urine-throwing incident.

During the PCR hearing, Petitioner presented testimony to show that the urine-throwing incident was the only instance of bad behavior during confinement. In fact, Petitioner was selected as the Manning Correctional Institution's inmate of the year and was nominated for the Department of Corrections' inmate of the year. He also sang in the prison choir and participated in other Christian activities. A jail administrator and prison minister testified that Petitioner was a model inmate. Defense counsel could have **67 easily discovered this adaptability evidence prior to trial but failed to do so. [FN7]

FN7. The United States Supreme Court has recently recognized that defense counsel must conduct a reasonable investigation "to discover *all reasonably available* mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, ----, 123 S.Ct. 2527, 2537, 156 L.Ed.2d 471 (2003) (citation omitted).

Sixth, defense counsel presented no mitigating social history evidence to explain the Petitioner's odd childhood behavior to

which his sister referred to during the guilt phase. Defense counsel failed to reveal that Petitioner was beaten throughout his childhood; his father was an alcoholic who fought with *490 many family members; he was treated with alcohol as a child in lieu of over-the-counter medication; and he grew up in a family of extreme poverty and physical deprivation.

Seventh, defense counsel's seven-minute mitigation presentation failed to provide the jury with *any* insight concerning Petitioner's mental illness. At the PCR hearing, Petitioner introduced evidence that he has a family history of schizophrenia, he has a history of hearing voices in his head, and he has suffered neurological damage.

Finally, during the closing argument, co-counsel failed to plead for Petitioner's life and referred to him as a "sick" man.

We hold that this trial presentation amounts to a classic *Cronic* ineffectiveness case, as defense counsel completely failed to test the prosecution's case. If anything, defense counsel's actions, and inactions, reinforced the prosecution's argument that the Petitioner should be convicted and sentenced to death.

We decline to recognize this consistently inept form of lawyer conduct as acceptable in this state, nor will we employ a prejudice analysis, for "[defense] counsel's ineffectiveness [was] so pervasive as to render a particularized prejudice inquiry unnecessary." *Frett v. State,* 298 S.C. 54, 56, 378 S.E.2d 249, 251 (1988).

CONCLUSION

We find that defense counsel's conduct, investigation, preparation and presentation of Petitioner's defense during the guilt phase and sentencing phase of Petitioner's trial provided no meaningful adversarial challenge to the prosecution's case.

We apply the *Cronic* "meaningful adversarial challenge" analysis to this case because we find that this trial represents the classic example of a judicial process that lost "its character as a confrontation between adversaries." *Cronic*, 466 U.S. at 656-657, 104 S.Ct. at 2045-2046. Thus, Petitioner's constitutional right to effective assistance of counsel has been violated.

Accordingly, we REVERSE Petitioner's convictions and sentences and REMAND the case for a new trial.

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice JAMES R. BARBER, III, concur.

358 S.C. 480, 596 S.E.2d 62

END OF DOCUMENT

APPENDIX V

Supreme Court of South Carolina.

Robert Lee **NANCE**, Petitioner,

v.

R. Dodge FREDERICK, Director, South Carolina Department of Corrections,

Respondent.

Petition for Rehearing is denied.

May 25, 2004.

05-1580

IN THE SUPREME COURT OF THE UNITED STATES

JON E. OZMINT, Director, South Carolina Department of Corrections, *Petitioner*,

v.

ROBERT LEE NANCE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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Capital Case

Questions Presented

I. Is there any compelling reason for this Court to grant the writ of certiorari, following this Court's remand for further consideration in light of *Florida v. Nixon*, 543 U.S. 175 (2004), where the petition primarily asserts only that the unanimous South Carolina Supreme Court correctly stated the *Cronic* standard again but then made erroneous factual findings and misapplied the standard?

II. Is there any compelling reason for this Court to review this case in light of the lower court's application of the *Cronic* standard and the fact that the result in this case would be the same even if the alternative *Strickland* standard urged by Petitioner was applied?

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II. There is no compelling reason for this Court to review this case because application of the alternative *Strickland* standard, which Petitioner requests, would render the same result. 12

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Respondent, Robert Lee Nance, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the South Carolina Supreme Court's opinion in this case. The opinion is reported at *Nance v. Ozmint*, 626 S.E.2d 878 (S.C. 2006).

Statement of the Case

Robert Nance was arrested for murder and other offenses in the early morning hours of November 7, 1992. Appendix (App.) 407.[1] On December 10, 1992, lead counsel was appointed to represent him. App. 1847. In April 1993, after the state served notice of intent to seek the death penalty, co-counsel was appointed. App. 1847. Two months later, in June 1993, Robert Nance proceeded to trial. App. 8.

While Petitioner quotes the lower court's opinion with respect to the state's evidence of guilt, Petitioner fails to address the remainder of the significant facts found by the lower court.

TRIAL PRESENTATION

> [2] Following [Nance]'s arrest, defense counsel was appointed as [Nance]'s lead counsel. At the time he was appointed, defense counsel had either recently suffered from or was then suffering from pneumonia, gout, ulcers, diabetes, alcoholism, and congestive heart failure. During the trial he was taking various prescription medications, including Valium, Lopressor, Isocet, and Tenormin. At the PCR hearing, [Nance]'s experts testified that the side effects of those medications included impaired memory, lack of sleep, and sedation. Defense counsel's testimony at the PCR hearing indicated that he remembered very little from the trial that took place 5 years before the PCR hearing.[2]
>
> An attorney, who had only been practicing law for eighteen months, was appointed as co-counsel. Co-counsel testified at the PCR hearing that [Nance]'s mother was the only family member who was interviewed prior to trial; that he did

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[1]Appendix refers to the Appendix filed in the South Carolina Supreme Court in its review of the issues before this Court.

[2]There was also substantial evidence that counsel suffered from dementia associated with chronic alcohol consumption at the time of trial. *See, e.g.*, App. 2138-57, 3480, 3484, 3516.

not recall that anyone investigated [Nance]'s background; and that no one had requested [Nance]'s records from the Department of Corrections.[3]

The psychologist who planned to offer expert testimony concerning [Nance]'s mental health, Dr. Dewitt (Dewitt), asked defense counsel for [Nance]'s medical records, social history, statements from family members, and statements from the Department of Corrections staff but never received them.[4] He received [Nance]'s hospital records a few hours before trial.

GUILT PHASE

When introducing himself in his opening statement to the jury, co-counsel said, "I did not ask [to represent [Nance]], I was simply appointed. [defense counsel], as the public defender, did not ask for this case either. He was just appointed to represent Mr. Nance." In addition, defense counsel presented only three witnesses to testify on behalf of [Nance]'s defense: a corrections officer, an unqualified expert, and [Nance]'s sister.

Defense counsel's first witness, a Florence County detention center officer, testified that while in prison, [Nance] threw urine at a female corrections officer. On cross-examination, the officer testified that this episode was [Nance]'s only incident of misbehavior during the seven-month period that [Nance] was under his watch.

The defense's second witness, Dewitt, testified about [Nance]'s mental health. Based on only two meetings with [Nance], Dewitt opined that [Nance] more

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[3]Counsel also failed to gather school records, medical records, confinement records, police reports, witness statements, or family records. App. 1814-15, 1858.

[4]Even though counsel hoped to support an insanity defense, Dr. Dewitt also never received any information concerning the offenses. App. 598, 610-12, 2502.

closely resembled a criminal who was guilty but mentally ill.[5] Defense counsel was not successful in qualifying Dewitt as an expert.[6]

The defense rested after Dewitt's testimony. The trial judge then granted defense counsel's request to reopen his presentation so that [Nance]'s sister could testify. Defense counsel failed to prepare the sister's testimony but asked that she testify about [Nance]'s childhood.[7] The sister testified that [Nance] was an abnormal child: pretending to be an undertaker, he buried one of his brothers; pulled a gun on their father; stabbed himself with a broken bottle; and killed their pets.

In sum, the testimony that defense counsel presented in [Nance]'s guilt phase defense consisted of testimony of a corrections officer concerning the only incident of misconduct that [Nance] committed while incarcerated; an opinion by an uninformed psychiatrist who was not qualified as an expert; and unprepared testimony of [Nance]'s sister about [Nance]'s oddities as a child.

SENTENCING PHASE

Defense counsel's mitigation presentation during the sentencing phase of the trial lasted seven minutes. Counsel began by waiving the opening statement and then incorporated the meager amount of defense testimony elicited during the guilt phase.

Defense counsel then presented the testimony of a corrections officer of the Florence Detention Center, who testified that [Nance] was taking two prescription medications, Cogentin and Haldol, and that [Nance] had taken Haldol that morning.[8]

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[5]During the opening statements in the guilt-or-innocence phase, counsel told the jurors that they were going to present an insanity defense, App. 345, but then presented no evidence of insanity. Instead, the defense expert testified only that Nance was guilty but mentally ill. App. 610. Nonetheless, counsel argued again in closing argument that the only defense was insanity. App. 681. Finally, in closing arguments in sentencing, defense counsel told the jury that the defense was *not saying*–although they had throughout the trial–that Nance did not know right from wrong. *Compare* App. 345 *with* App. 777. Thus, in addition to failing to present any cohesive theory, counsel lost all credibility with the jury by contradicting themselves. App. 3532.

[6]In fact, counsel failed to even offer Dewitt as an expert. App. 659.

[7]Trial counsel only spoke to Nance's sister in the courtroom during a 15 minute recess just before her testimony. App. 613, 2433.

[8]While this witness was purportedly called to testify about adaptability to confinement, App. 824, counsel did not ask about that issue, App. 763. *See also* App. 1919 (admission of co-counsel

(continued...)

Counsel presented no further testimony, to which the trial judge responded by asking, "Are you ready to go to the jury?" Counsel responded, "We incorporate what we feel, Your Honor–the doctor and the other testimony by the sister would be repetitious." The judge then replied, "Do you need any time to collect your thoughts? This is rather quick." Co-counsel gave the closing argument, refusing to plead for [Nance]'s life and referring to [Nance] as a "sick" man who did "sick things."

We find that this trial presentation, in its entirety, represents a classic *Cronic* ineffectiveness case, falling under the second *Cronic* scenario because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of [Nance]'s trial. For the reasons set forth below, we presume [Nance] was prejudiced, and accordingly, grant him a new trial.

First, [Nance] was disadvantaged from the outset because lead defense counsel was in ill health and on heavy medication, and co-counsel had only practiced law for eighteen months.

Second, in aid of its claim that [Nance] was mentally ill, the defense had wanted [Nance] to appear in the courtroom in his natural demeanor, unaffected by the administration of psychotropic drugs. The defense was successful in getting the trial judge to order such. Nevertheless, defense counsel failed to inform the jail personnel of the trial judge's order that [Nance] be taken off the anti-psychotic drug, Haldol. Consequently, [Nance] remained in a drug-influenced demeanor during the entire trial, and the jury never observed his natural demeanor.

Third, the trial had just begun when co-counsel communicated to the jury that neither he nor defense counsel wanted to be there.

Fourth, while defense counsel may have been pursuing a defense of guilty but mentally ill (GBMI), he failed to qualify his own expert. Further, by eliciting the unprepared testimony of [Nance]'s sister only *after* defense psychologist Dewitt testified, defense counsel failed to give his unqualified expert, at minimum, the opportunity to inform the jury of how the sister's testimony of [Nance]'s mental irregularities as a child could lead to a conclusion that [Nance] was mentally ill at the time of the murder.

Fifth, defense counsel presented no adaptability evidence at the sentencing hearing. In fact, by merely incorporating the testimony elicited from the guilt phase, defense counsel gave the impression that [Nance] had not adapted to confinement,

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[#](...continued)
that this testimony made no sense).

because the only evidence that had been presented concerning his confinement was the urine-throwing incident.

During the PCR hearing, [Nance] presented testimony to show that the urine-throwing incident was the only instance of bad behavior during confinement. In fact, [Nance] was selected as the Manning Correctional Institution's inmate of the year and was nominated for the Department of Corrections' inmate of the year. He also sang in the prison choir and participated in other Christian activities. A jail administrator and prison minister testified that [Nance] was a model inmate. Defense counsel could have easily discovered this adaptability evidence prior to trial but failed to do so.

Sixth, defense counsel presented no mitigating social history evidence to explain [Nance]'s odd childhood behavior to which his sister referred to during the guilt phase. Defense counsel failed to reveal that [Nance] was beaten throughout his childhood; his father was an alcoholic who fought with many family members; he was treated with alcohol as a child in lieu of over-the-counter medication; and he grew up in a family of extreme poverty and physical deprivation.

Seventh, defense counsel's seven-minute mitigation presentation failed to provide the jury with *any* insight concerning [Nance]'s mental illness. At the PCR hearing, [Nance] introduced evidence that he has a family history of schizophrenia,[9] he has a history of hearing voices in his head, and he has suffered neurological damage.[10]

Finally, during the closing argument, co-counsel failed to plead for [Nance]'s life and referred to him as a "sick" man.[11]

Nance, 626 S.E.2d at 881-83 (quoting *Nance v. Frederick*, 596 S.E.2d 62, 65-66 (S.C. 2004), *vacated and remanded*, 543 U.S. 1043 (2005)) (court's internal footnotes omitted).

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[9] Nance's aunt, diagnosed with schizophrenia, was hospitalized at the State Hospital for 20 years. App. 2840-87; 3222-23.

[10] Nance has significant neurological damage, App. 2016, in the frontal and temporal lobes of the brain, App. 2017, 2019, 2094.

[11] Counsel waived opening argument in sentencing.

In addition to excluding these facts found by the South Carolina Supreme Court from the Statement of the Case, Petitioner also fails to address other significant facts presented in evidence and included in the record before the lower court for its consideration. For example:

- Due to counsel's failure to investigate, the jury was also unaware of Nance's intoxication at the time of the offenses. He and another man shared at least two pints of Canadian Club whiskey between them just hours before the offenses. App. 2481. Officers smelled alcohol on Nance at the time of arrest, App. 2381, and observed that Nance appeared to be in a dazed condition as if he were "high" on drugs or alcohol hours later, App. 2219, 2230.
- During sentencing, counsel stipulated to admission of a prior conviction that Nance does not have. App. 732, App. 2949-55. Nance was in confinement on the date of this alleged offense and could not have committed the crime. App. 2470, 2474.
- Although the issue of parole was raised during the trial and sentencing due to Nance's prior release on parole, counsel failed to request an instruction that Nance would be ineligible for parole if sentenced to life imprisonment. *See Simmons v. South Carolina*, 512 U.S. 154 (1994).
- Counsel failed to object when the trial court charged the jury more than 40 times in sentencing that it would only be making a "recommendation" on sentence. App. 730, 742, 779-90. The court never made it clear that the jury's recommendation would be followed. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Despite counsel's repeated failures and the minimal amount of evidence presented by the defense, the jury still deliberated for more than an hour and a half before sentencing Nance to death. App. 783 (8:15 p.m.), 787 (9:50 p.m.).

Reasons Why the Petition Should Be Denied

I. No compelling reason exists for this Court to grant the writ of certiorari because this second petition primarily asserts only that the lower court made erroneous factual findings and misapplied this Court's holding in *Cronic*, even though the lower court correctly stated the *Cronic* standard and the *Strickland* standard and further considered the issue following this Court's remand.

Under Rule 10 of this Court's Rules, certiorari will be granted "only for compelling reasons."

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rules of the Supreme Court of the United States (May 2, 2005). Throughout the petition, Petitioner complains primarily that the lower court misapplied this Court's holdings in *United States v. Cronic*, 466 U.S. 648 (1984), *Bell v. Cone*, 535 U.S. 685 (2002), and *Florida v. Nixon*, 543 U.S. 175 (2004), due to its findings of fact that Petitioner complains were based upon a "speculative showing." Indeed, Petitioner devotes substantial time to argument that the lower court's findings of fact were erroneous. Petition at 13-16.

This Court has repeatedly held that, absent exceptional circumstances, this Court will not reexamine the state court's findings of fact, but will instead "defer to the state-court's factual findings, even when those findings relate to a constitutional issue." *Hernandez v. New York*, 500 U.S. 352, 366 (1991). "Moreover, 'an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.'" *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 113 (1985)).

Even assuming that the lower court's decision was erroneous, this Court's jurisdiction should not be invoked simply to correct errors in a lower court decision that is greatly fact-driven and very unique. *See* Rule 10 (Court will "rarely" grant review where lower court has arguably misapplied "a properly stated rule of law"). Indeed, "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

In Petitioner's attempt to distinguish the clearly factual nature of its primary argument asserting simply that the lower court's ruling was erroneous, Petitioner argues that the state court failed to recognize, as other courts have, that *Cronic* is to be applied only in limited circumstances. Petition at 11. The state court clearly held, however, that *Cronic* is to be applied "infrequently," *Nance*, 626 S.E.2d at 880, and was applied here only because there was "a complete breakdown in the adversarial process," *Nance*, 626 S.E.2d at 878. Likewise, despite Petitioner's allegations that it "disregarded" and "ignored" this Court's prior order, Petition at 1, 6, the lower court held:

> In light of the recent holding in *Nixon*, we believe the present case represents one of the rare cases where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."

Id. at 882 (emphasis in original). Indeed, the court concluded that trial counsel actually "helped to further bolster the prosecution's case against [Nance] rather than providing him with a defense." *Id.* at 883.

The only conclusion possible from these findings is that the South Carolina Supreme Court's findings are clearly in line with those of other courts applying *Cronic* only in limited circumstances.[12]

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[12]*See, e.g., Van Patten v. Deppisch*, 434 F.3d 1038 (7th Cir. 2006); *Plumlee v. Sue Del Papa*, 426 F.3d 1095 (9th Cir. 2005); *United States v. Morris*, 377 F. Supp. 2d 630 (E.D. Mich. 2005); (continued...)

In fact, in the twenty years since *Cronic* was decided, the lower court has only cited *Cronic* twice before this case and never since. *See McKnight v. State*, 465 S.E.2d 352, 353 (S.C. 1995) (prejudice presumed due to counsel's absence during the testimony of the victim, which was a critical stage of trial); *Frett v. State*, 378 S.E.2d 249, 250 (S.C. 1988) (rejecting *Cronic* presumption of prejudice based just on trial counsel's unpreparedness and sleeping during trial, but granting relief based on its holding that "counsel's ineffectiveness [was] so pervasive as to render a particularized prejudice inquiry unnecessary").

Petitioner asserts without citation, again implying some conflict in decisions, that "this Court has summarily vacated and remanded a number of decisions employing a presumption of prejudice analysis such as that relied upon by the state supreme court in this case." Petition at 16-17. Respondent's counsel have only been able to identify three cases remanded for further consideration in light of *Bell v. Cone*.[13] All three cases were from the Sixth Circuit. *Bell v. Quintero*, 535 U.S. 1109 (2002); *Jones v. French*, 535 U.S. 1109 (2002); *Mason v. Mitchell*, 536 U.S. 901 (2002).

In each of these cases, after further consideration, the Sixth Circuit still granted relief on the basis of a presumption of prejudice under *Cronic*. In *Bell v. Quintero*, the court distinguished *Bell v. Cone* on "the facts."

> Because the alleged deficient performance in *Cone* affected only specified parts of Cone's trial, prejudice could not be presumed. In the case at bar, on the other hand, counsel's acquiescence in allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of

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[12](...continued)
People v. Morris, 807 N.E.2d 377, 407, *overruled on other grounds by People v. Pitman*, 813 N.E.2d 93 (Ill. 2004).

[13]This was the only case remanded for further consideration in light of *Nixon*.

> "meaningful adversarial testing" throughout the proceeding, making "the adversary process itself presumptively unreliable."

Quintero v Bell, 368 F.3d 892, 893 (6th Cir. 2004), *cert. denied*, 544 U.S. 936 (2005).

In *French v. Jones*, 332 F.3d 430, 439 (6th Cir.), *cert. denied*, 540 U.S. 1018 (2003), the court held that *Bell v. Cone* was inapplicable "to claims of denial of counsel during a critical stage." Reversal was required in *French* with a presumption of prejudice because the petitioner's counsel had been absent during supplemental jury instructions, which was a critical stage of trial.

In *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003), *cert. denied*, 543 U.S. 1080 (2005), the court again held that the defendant had been completely denied counsel prior to trial and prejudice was presumed. The court found that during the entire six months of counsel's representation, he met with the defendant no more than six minutes. It held that the pretrial period constitutes a critical stage of the proceedings because the pretrial period "encompasses counsel's constitutionally imposed duty to investigate the case." *Id.* at 743.

> The illogic of applying *Strickland* to these facts is manifest in that there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client prior to trial. Such a meeting is vital if counsel is competently to develop a defense. If counsel does not meet with his client for more than two minutes at a time, the defendant is unable to confide truthfully in his lawyer, and counsel will not know, for example, which investigative leads to pursue, whether there are witnesses for the defense, or what kind of alibi the defendant may have.

Id. at 747.

In each of these cases, this Court declined further review, presumably because the lower court had appropriately analyzed the issue and, correct or not, its resolution did not warrant further review by this Court. Here, just as in those cases, the lower court has already cited the correct rules of law and conducted the appropriate analysis.

Petitioner also asserts that this Court should grant certiorari because the lower court's decision is "inconsistent even with the final position of Respondent's counsel below." Petition at 17. Regardless of Respondent's position below, the lower court was not bound by that position in making its determination that the *Cronic* analysis was the appropriate standard with respect to Petitioner's Sixth Amendment challenge. "The law is the law, whatever the parties . . . may have argued." *Stutson v. United States*, 516 U.S. 163, 184 (1996) (Scalia, J., dissenting).

Finally, the lower court's unanimous decision, which was written by the Chief Justice, is arguably based on an adequate and independent state ground. As this Court has recognized, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law . . .[a practice that] reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

While the lower court cited *Cronic*, it also cited its own decision in *Frett v. State*, which rejected a *Cronic* presumption of prejudice and applied *Strickland*'s analysis. *Frett*, 378 S.E.2d at 250. The court concluded, however:

> While a defendant must ordinarily show that counsel's ineffective assistance resulted in actual prejudice, such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.

Id. In this case, prior to the remand, the court recognized that

> at the time this case was tried, South Carolina common law provided little guidance as to what constituted an attorney's complete failure to provide effective representation. We hope that this opinion provides some clarity as to what does *not* constitute effective representation.

Nance, 596 S.E.2d at 66 n.5. Following the remand, the court continued to hold that this type of

> "consistently inept form of lawyer conduct [is not] acceptable in this state, nor will we employ a prejudice analysis, for '[defense] counsel's ineffectiveness [is] so pervasive as to render a particularized prejudice inquiry unnecessary.'" *Nance*, 358 S.C. at 490. 596 S.E.2d at 67 (citing *Frett v. State*, 298 S.C. 54, 56, 378 S.E.2d at 249, 251 (1988)).

Nance, 626 S.E.2d at 883.

Given all of these circumstances, this Court should deny certiorari. A ruling in this case is unlikely to affect any other case, given the unique factual scenario and the state court's apparent reliance on South Carolina common law.

II. There is no compelling reason for this Court to review this case because application of the alternative *Strickland* standard, which Petitioner requests, would render the same result.

Even if the lower court erred in applying a *Cronic* analysis, this Court should deny certiorari because the same result would clearly be reached under this Court's *Strickland* analysis. The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance, *id.* at 692.

In assessing whether counsels' conduct was reasonable under the *Strickland* standard, this Court must consider the extent of investigation conducted by counsel. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91. *See also Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel's failure to discover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on the defendant's voluntary confessions because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background").

"Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). *See also Rompilla v. Beard*, 125 S. Ct. 2456, 2463 (2005) (there is no requirement that defense counsel "scour the globe on the off-chance something will turn up"); *Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir. 1997) (counsel need not have "a scorch-the-earth strategy"). Nonetheless, a decision not to investigate "must be directly assessed for reasonableness in all the circumstances," *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 691), and "an attorney must look into readily available sources of evidence," *Hall*, 106 F.3d at 749-50.

In assessing whether counsels' conduct was reasonable in both *Williams* and *Wiggins*, the Court held that when counsel fails to adequately investigate or to make a reasonable decision after investigation, counsel's performance is deficient because counsel cannot have a valid "strategy" not to pursue evidence that is unknown to counsel due to a failure to adequately investigate. *Williams*, 529 U.S. at 396 ("the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession" because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *Wiggins*, 539 U.S. at 527-28 ("counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible").

The Court described the issue in *Wiggins* as "not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." *Id.* at 523 (emphasis in original). In *Wiggins*, "counsel were not in a position to make a reasonable strategic

choice . . . because the investigation supporting their choice was unreasonable." *Id.* at 536. Counsel's conduct was deficient because the evidence revealed that the "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Id.* at 526.

Here, as the lower court found, counsel conducted virtually no investigation, failed to prepare or even offer their expert witness as an expert during the trial. Counsel also deprived their own expert of the opportunity to explain how Nance's "mental irregularities as a child could lead to a conclusion that [Nance] was mentally ill at the time of the murder." *Nance*, 626 S.E.2d at 882. This evidence, particularly in light of counsel's failure to challenge the state's case, clearly reveals that Nance was prejudiced during the trial.

Likewise, prejudice in sentencing is clear where the defense presented no mitigation, even though Nance had significant social history mitigation, including an alcoholic, abusive father, and a childhood spent in "extreme poverty and physical deprivation." *Id.* at 883. Counsel also presented no insight into Nance's mental illness and no evidence of his neurological damage. *Id.* Counsel also failed to present evidence that Nance had been a model inmate, who adapted well to confinement. *Id.* Finally, counsel never even "plead[ed] for [Nance's] life." *Id.* Clearly, if all of the available evidence had been presented and counsel had appropriately advocated for Nance, there is a reasonable probability that the result of the proceeding would have been different. If Nance's "sentencing jury . . . . [h]ad . . . been able to place [his] excruciating life history on the mitigating side of the scale, there is a reasonable probability that *at least one juror* would have struck a difference balance." *Wiggins*, 539 U.S. at 537 (emphasis added).

Conclusion

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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No. 05-1805

IN THE SUPREME COURT OF THE UNITED STATES

JON E. OZMINT, Director, South Carolina
Department of Corrections, Petitioner,

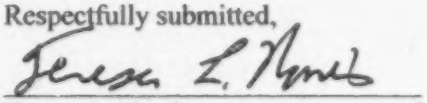
vs.

ROBERT LEE NANCE, Respondent.

CERTIFICATE OF SERVICE

I certify that a copy of the Motion for Leave to Proceed In Forma Pauperis and the Brief in Opposition to the Petition for Writ of Certiorari was served upon the attorney for Respondent. Service was made by U.S. mail, first class, postage prepaid, to Donald J. Zelenka, Esq., Assistant Deputy Attorney General of South Carolina, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

Respectfully submitted,



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July 12, 2006

Honorable William K. Suter
Clerk, Supreme Court of the United States
One 1st Street, N.E.
Washington, DC 20543

Re: *Jon E. Ozmint v. Robert Lee Nance*, 05-1580

Dear Mr. Suter:

Enclosed please find for filing, with proof of service, the original and ten (10) copies of the Brief in Opposition to the Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis.

Please do not hesitate to contact me if you have any questions regarding this matter or if I can provide you with any additional information.

Sincerely,

Teresa L. Norris

Teresa L. Norris

Enc.

cc: Donald J. Zelenka
William N. Nettles

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2005

No. 05-1580

JON E. OZMINT, Director, South Carolina Department of Corrections,

Petitioner,

vs.

ROBERT LEE NANCE,

Respondent.

REPLY TO BRIEF IN OPPOSITION

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ARGUMENTS IN REPLY

I. **Petitioner does not primarily assert "only that the lower court made erroneous factual findings;" rather, Petitioner asserts that the lower court erroneously applied this Court's decision in *Cronic,* and that a proper analysis of Respondent's claims under *Strickland* shows he failed to prove actual prejudice.**

II. **The state supreme court did not rely upon an independent and adequate state law ground.**

III. **Respondent did not demonstrate actual prejudice under *Strickland* in the penalty phase of his trial based upon trial counsel's failure to (1) object to introduction of a 1981 conviction; (2) request a *Simmons* charge; or (3) object to use of the word recommendation in the jury charge.**

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III. Respondent did not demonstrate actual prejudice under *Strickland* in the penalty phase of his trial based upon trial counsel's failure to (1) object to introduction of a 1981 conviction; (2) request a *Simmons* charge; or (3) object to use of the word recommendation in the jury charge. 3

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ARGUMENTS IN REPLY

I. Petitioner does not primarily assert "only that the lower court made erroneous factual findings;" rather, Petitioner asserts that the lower court erroneously applied this Court's decision in *Cronic*, and that a proper analysis of Respondent's claims under *Strickland* shows he failed to prove actual prejudice.

Respondent (Nance) contends that this Court should deny certiorari because Petitioner allegedly is complaining only about the erroneous factual findings by the state supreme court. However, Petitioner's discussion of the "speculative showing" of lead counsel's supposed physical limitations (**Petition, pp. 13-16**) was designed to show how the lower court was misled into applying *Cronic* because of those perceived problems, "[m]uch like the dissent in *Cone*." **Petition, p. 13**. As both arguments in the **Petition** make clear, certiorari should be granted because, on remand, the state supreme court steadfastly refused this Court's prior directive to reconsider the case in light of *Florida v. Nixon*, 534 U.S. 175 (2004). Rather than meaningfully analyze Nance's ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984)'s two-pronged test, the state supreme court republished virtually all of its previously-vacated decision in the course of (again) finding that Nance had received ineffective assistance of counsel based upon a presumption of prejudice analysis. *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878, 679-84 (2006) (*Nance II*). Petitioner unequivocally asserts that the lower court's analysis is grossly inconsistent with this Court's Order remanding the case and its decisions in *United States v. Cronic*, 466 U.S. 648 (1984), *Nixon* and *Bell v. Cone*, 535 U.S. 685, 696-97 (2002) because trial counsel were present, they offered at least some defense for him at trial and their performance simply cannot be considered so egregious as to have completely precluded an adversarial proceeding. **Petition, pp. 6-17**. Also, a proper Sixth Amendment analysis under *Strickland*

shows that Nance did not prove actual prejudice - *i.e.*, he did not prove a reasonable probability of a different result but for counsel's errors. *Strickland*, 466 U.S. at 694-95. **Petition, pp. 17-29.**[1]

II. The state supreme court did not rely upon an independent and adequate state law ground.

Nance claims (**BIO, pp. 11-12**) that the state supreme court's decision "is arguably based on an adequate and independent state ground" because the lower court relied upon *Frett v. State*, 378 S.E.2d 249, 251 (S.C. 1988) in addition to *Cronic*. See *Nance II*, 626 S.E.2d at 883. As demonstrated in the **Petition**, the reliance upon *Frett* "is **not** a state law basis for applying a presumption of prejudice to Nance's claims. Rather, *Frett* is yet another example of the state supreme court's erroneous analysis of ineffective assistance claims under the Sixth Amendment. *Frett* cites *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984), which in turn, relied upon *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982). *House* was overruled by this Court's seminal decision in *Strickland*." **Petition, p. 8 n.3**. Nance's present claim is contrary to the position he took below, since he conceded at oral argument that he had not raised a state constitutional ground in the PCR court and the issue was not preserved on certiorari. *See State v. Bailey*, 377 S.E.2d 581, 584 (S.C. 1989) (a party may not argue one ground at trial and then an alternative ground on appeal) Moreover, his current argument is belied by his unsuccessful argument on **pp. 3-4** of his **Return to Petition for Rehearing** that the state supreme court should recognize a presumption of prejudice in PCR cases, as a matter of

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[1]These points will not be argued again in Reply, since they are covered in the Petition.

state constitution[2] now, under S.C. Const art. I, § 14.[2]

III. Respondent did not demonstrate actual prejudice under *Strickland* in the penalty phase of his trial based upon trial counsel's failure to (1) object to introduction of a 1981 conviction; (2) request a *Simmons* charge; or (3) object to use of the word recommendation in the jury charge.

Petitioner has already addressed virtually all of the clams raised in the **Brief in Opposition** and has demonstrated that Nance failed to prove a reasonable probability of a different result under *Strickland v. Washington*, *supra*. However, Nance raises three ineffective assistance claims, relating to the penalty phase of his trial, that were not raised in *Nance II*, *supra*, and have not yet been addressed. **BIO, pp. 6-7**. Petitioner submits that he failed to demonstrate actual prejudice on these claims.

A. Evidence of 1981 conviction.

One of the prior convictions the State introduced in the penalty phase was an April 13, 1981, Lee County conviction for carrying a pistol on premises where alcoholic beverages are sold, for which Nance received a six month sentence, suspended on five years probation. **App. 732**. Nance contends that trial counsel were ineffective in failing to object to this conviction **(Applicant's Exhibit 29)** because this conviction was not one of his prior convictions. Even assuming *arguendo* that trial counsel

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[2]A state constitutional standard does, and has existed The farce and mockery standard, as stated in the 1962 case of *Crosby v. State*, 241 S.C. 40, 126 S.E.2d 843, 845 (1962) precluded relief unless the inmate proved that the alleged lack of effective assistance of counsel was of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice. Under this standard, mere allegations of incompetency or inefficiency of counsel did not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. Clearly, that standard requires an inmate to meet a higher burden than the two-prong *Strickland* test, and is not met in this case.

was deficient, Petitioner submits that this Court should grant certiorari because Nance defaulted on ant claim of prejudice by not challenging the PCR judge's finding that he failed to prove actual prejudice from counsel's performance certiorari in the state supreme court. As the result of his failure to make this argument in the lower that he was prejudiced by counsel's failure to object to the introduction of the April 1981 conviction, the law of the case is that there was no prejudice, *Caprood v. State*, 525 S.E.2d 514, 518 (S.C. 2000) ("Because the State has not appealed the PCR court's ruling that counsel was deficient in failing to protect his client's interests when a witness referred to Respondent's 'rap sheet,' that ruling is law of the case"), and only presumed prejudice entitles him to relief. ***See*** **App. 4923-27**,[3]

B. Absence of Simmons instruction.

Nance would have been ineligible for parole had he received a life sentence because of a prior voluntary manslaughter conviction. S.C. Code §§ 16-1-60 & 24-21-260 (Supp. 1993). He contends that trial counsel injected the issue of parole into the proceedings but failed to request a charge on parole ineligibility. The PCR court rejected these allegations. **App. 4918-20; 4958-**

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[3]To the extent, the Court finds that Nance did not default on the question of whether there was actual prejudice, Petitioner submits that any supposed error under *Johnson v. Mississippi*, 486 U.S. 578 (1988) was harmless beyond a reasonable doubt under *Clemons v. Mississippi*, 494 U.S. 738, 747 n. 5 (1990), for the reasons stated by the PCR court: the jury charge prevented the jury from relying on this conviction to prove a statutory aggravating circumstance, **App. 770-83**, the Solicitor only made a brief reference to this conviction in argument and did not argue it as a basis for a death sentence, **App. 756-67**; the trial court gave two instructions that limited the jury's consideration of prior convictions to evidence of his character, **App. 752-53; 778**; and the evidence concerning the 1981 conviction paled to the graphic eyewitness testimony and other evidence presented by the State concerning Nance's activities on the night of the murder. **App. 4923-27**. *See Edwards v. Scroggy*, 849 F.2d 204, 211-13 (8th Cir. 1988).

63; 4977-88; and the state supreme court did not address this claim in *Nance II, supra*. Even assuming *arguendo* that he was entitled to a *Simmons* charge or argument, he cannot show prejudice - *i.e.*, that "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently weighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Nance contends counsel was ineffective for failing to either argue parole ineligibility or request a "life without parole" instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). However, trial counsel cannot be held ineffective for not having the psychic ability to foresee this Court's changes in the law. Before this Court's 1994 ruling in *Simmons* (and including the time of counsel's representation),[4] state law was that any requested charge on parole ineligibility should not be given; and that a charge that "life imprisonment" should be understood in its "plain and ordinary meaning" would ensure a reasonable juror understood that life imprisonment was without parole. *State v. Simmons*, 427 S.E.2d 175 (S.C. 1993). Because counsel's failure to request this charge was consistent with then-existing state law, Nance has not shown any prejudice. *See Strickland*, 466 U.S. 668, 689-90 (1984); *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995) (counsel not ineffective for failing to proffer evidence of future adaptability to prison even though this Court had granted certiorari in *Skipper). Cf. O'Dell v. Netherland*, 521 U.S. 151(1997) (finding *Simmons* was a "new rule"under *Teague v.*

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[4]Nance was tried from June 21-25, 1993. A Notice of Appeal was served on June 28, 1993. Thereafter, Nance filed a motion for a new trial. The trial court denied the motion on July 16, 1993. Nance's appeal from the denial of the new trial motion was consolidated with the direct appeal from his verdicts and sentence of death. **See "Statement of the Case", Petition, pp. 3-4.** This Court granted certiorari in Simmons on October 4, 1993. *Simmons v. South Carolina*, 510 U.S. 811 (1993).

Lane, 489 U.S. 288 (1989) and not compelled by existing precedent).[5]

The case for rejecting Nance's claim here is even stronger than in *Kornahrens* and *Randolph*, since, unlike those cases, this Court *had not yet granted certiorari* in *Simmons*; and, at the time of Nance's trial, there was no express indication the Court was going to review the issue. Instead, at the time of Nance's trial, recent South Carolina precedent had not only repeatedly rejected such a claim but had noted that (1) "parole is not a proper consideration for a sentencing jury," and (2) that the United States Supreme Court had ruled the issue was a matter of state law. *Simmons*, 427 S.E.2d at 178-79 (citing *California v. Ramos*, 463 U.S. 992 (1983)).[6] Further, this Court's decision that *Simmons*

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[5]Ample *Strickland* authority from other jurisdictions also supports this conclusion. *E.g., Jameson v. Coughlin*, 22 F.3d 427 (2nd Cir. 1994) (appellate counsel not ineffective for failing to raise issue which would have been rejected under existing state intermediate court precedent, nor was counsel ineffective for failing to foresee that the state's highest court would later overturn that precedent); *Walker v. Jones*, 10 F.3d 1569, 1573 (11th Cir. 1994) ("[b]ecause Alabama courts had rejected similar claims and the Supreme Court had not yet decided *Cage v. Louisiana*, 498 U.S. 39 (1990), trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt"); *Lilly v. Gilmore*, 988 F.2d 783 (7th Cir. 1993) (appellate counsel was not ineffective for failing to raise *Miranda* issue which would have been meritless under long line of state precedent, including a decision filed a few months before appellate counsel filed his brief, even though the United States Supreme Court subsequently reversed that decision); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (trial counsel was not ineffective for not raising *Batson* challenge two days before *Batson* was decided); *Horne v. Trickey*, 895 F.2d 497, 500 (8th Cir. 1990) (appellate counsel was not ineffective for failing to "realize that the [United States Supreme Court] was planning a significant charge in the existing law;" and the "failure to anticipate this change [does not rise] to the level of constitutional ineffectiveness")

[6]Trial counsel did request that a "plain and ordinary meaning" instruction be given to an individual juror if the juror mentioned parole during voir dire, **Defendant's Motion No. 28, App. 1126-27**, which reflects beyond

was a "new rule" further strengthens the case against Nance's claim of ineffective assistance. In *O'Dell*, the Court reviewed pre-*Simmons* precedent, including *Ramos*, and concluded: "[W]e think it plain that a reasonable jurist [prior the issuance of *Simmons*] would not have felt compelled to adopt the rule later set out in *Simmons*." 521 U.S. at 164. That the Court considered *Simmons* a new rule beyond mere application of prior precedent clearly removes any possibility that trial counsel was ineffective for failing to have sufficient psychic ability to foresee it.[7] Thus, Nance has not shown either deficient performance or prejudice.

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cavil counsel's awareness of the law as it stood in June 1993.

[7]Finally, Nance also complained in the lower court, about trial counsel's submission of the mitigator "Model Prisoner: placed on parole." Obviously, being a model prisoner who was placed on parole shows adaptability to prison life, which is a prototypical mitigator. *See e.g. Skipper v. South Carolina*, 476 U.S. 1 (1986). Clearly no prejudice arose from submission of a mitigator that highlighted Nance's past good behavior in prison. None of these aspects of Nance's trial resulted in interjection of parole to the jury. The references to the death of Nance's wife in the testimony of Dr. DeWitt did not mention parole, release or the type of crime, and were brief, isolated passages that were brought up only in the context of Nance's mental health history. Similarly, the testimony of Scott only mentioned "probation", and it also was a brief reference during a description of bizarre behavior. Further, the trial judge specifically gave the jury a limiting instruction that prior crimes evidence could only be used for character, and not be used as substantive proof of any aggravator. **App. 761-62; 785**. Thus, the jury was precluded from considering the prior conviction and sentence, and thus would not have considered parole in an aggravating fashion.

Further, the word "parole" was never mentioned to the jury by either side in argument. Also, the jury was only told about parole as a mitigator, and the jury was instructed that a mitigator is only a basis for a sentence less than death, not a basis for death. **App. 786-87**. The jury never once inquired whether Nance would be parole eligible if sentenced to life imprisonment. Thus, submission of the mitigator would not have caused the jury to focus on parole in a way that was prejudicial to Nance. *See State v. Perkins*, 481 S.E.2d 25 (N.C. 1997). Again, however, no prejudice resulted from counsel's failure to forecast this Court's departure from *Ramos* in *Simmons*.

C. The trial judge's charge did not violate *Caldwell v. Mississippi*

Nance also contends he received ineffective assistance because his trial counsel did not object to the trial court's sentencing phase charge that the jury only makes a "recommendation" of the sentence to be imposed. Petitioner submits that there was no prejudice from the failure to object because the charge was not improper under state law or the Eighth Amendment.

The charge in this case is sustainable under state law, which requires that the trial court convey the idea to the jury that its sentencing recommendation will be followed. *See State v. Johnson*, 410 S.E.2d 547, 556 (S.C. 1991) (rejecting a similar claim despite the trial court's repeated use of "recommend," because the trial court also instructed the jury the "ultimate punishment of this defendant will be in your hands"). First, the trial court's sentencing phase charges clearly made the jury aware that its "recommendation" would in fact be followed. After the jury had returned its guilt phase verdict and had been polled by the court, the trial court explained that because there had been a guilty verdict there would be a second portion of the trial, or a sentencing phase, following which the jury would recommend to the trial court the penalty that should be imposed upon the Nance. The trial court then specifically instructed the jurors that:

> now that there has been a guilty verdict in the guilt phase of the trial, we proceed to the second phase of the trial, the part of the trial where *you will listen to additional testimony and you will make a recommendation to the court with reference to the penalty that should be imposed by the judge. It will actually be your verdict as to what the penalty should be imposed.*

App. 714 (emphasis added). Other instructions by the trial court also conveyed to the jury the binding nature of their sentencing determination, such as the trial court's charge at the start of the penalty phase that the sole issue in the penalty phase was to determine life or death, and that the jury's sole function was "to determine whether the defendant should be sentenced to death or life imprisonment." **App. 730.** ***See also*** **App. 730-31;778C;781; 790.** This was sufficient under state law. *Id*; *State v. Middleton*, 368 S.E.2d 357 (S.C. 1988) (holding that similar "ultimate punishment of the defendant will be in your hands" language overcame the trial judge's repeated use of "recommend" in his sentencing phase charge).[8]

There also was no violation of *Caldwell v. Mississippi*, 472 U.S. 329 (1985), resulting from the use of the word "recommend." In *Caldwell*, the prosecutor specifically referred to the process of appellate review in death penalty cases in his closing argument, and he thereby intentionally "sought to minimize the jury's sense of responsibility for determining the appropriateness of death." 472 U.S. at 341. This Court found the prosecutor's representation to the jury was "quite focused, unambiguous, and strong." 472 U.S. at 340. The Court further found that in the context of capital sentencing "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are *state-inducted suggestions that the sentencing jury may shift its sense of responsibility to an*

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[8]The trial court's charge only mirrored the language of section 16-3-20, which states that the jury is to make a "recommendation" of sentence to the trial judge. The trial court also gave instructions which are the functional equivalent of the language which this Court found made the penalty phase charges in *Johnson*,, and *Middleton* sufficient. In addition to the cited portions of the penalty phase jury charge, the instructions and questions of the potential members of the jury during *voir dire* unequivocally conveyed the binding nature of the jury's sentencing role, **App. 41-42;73-74; 79; 148-49; 161-62; 172; 184; 188-90; 213-14; 257; 271; 276-77; 299; 310; 312**, as did the state's closing argument. **App. 768; 776.**

appellate court."472 U.S. at 330 (emphasis added). As a result, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id* at 328-329.

That the holding of *Caldwell* is confined to representations by the state mis-characterizing the role of the jury, was clarified by *Dugger v. Adams*, 489 U.S. 401,(1989), where the Court specifically held that to establish a *Caldwell* violation, a defendant necessarily *must* show that the remarks to the jury improperly described the role assigned to the jury by local laws. 489 U.S. at 408. *See also Gaskins v. McKellar*, 916 F.2d 941, 953 (4th Cir. 1990) (the trial judge's use of the word "recommend" in describing its function to the jury did not present a *Caldwell* violation because the record did not contain reference, by either the prosecutor or the trial judge, concerning death sentence review; and the evidence concerning a prior, vacated death sentence did not improperly describe the role assigned to the jury by local law). In the present case, there is no *Caldwell* violation because, as argued before, the trial judge's sentencing phase charge meets the standard in *Johnson* and *Middleton*. Since the judge's charge as to the jury's role meets the requirements of state law, *Dugger* ends any *Caldwell* claim, and there was no prejudice from counsel's failure to object.

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